Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HOWARD G. JOHNSON,

Petitioner,

vs.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, et. al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

HOWARD G. JOHNSON
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92 pp

QUESTIONS PRESENTED

1. Is a decision of the Ninth Circuit Court of Appeals applying *Younger* abstention to summarily dismiss a federal suit which asserts the employment of judges by a party to a proceeding is not bias warranting non-abstention contaminated by reason of the public and active participation by a judicial colleague on the tribunal who heads a Commission bearing his name at the request of a party to the proceedings and who authors a report, also bearing his name, also at the request of the party, which concerns the constitutional issues pending?

2. Is a State Supreme Court which appoints employees to a private party, and by finding against the other party obtains monies for their appointees' employer to reimburse their appointees' salaries and benefits and to fund other programs administered by their appointees, such a bias that *Younger* abstention does not apply?

3. Is the administrative decision-making by one who obtains monies to recoup his salary and benefits and those of his co-employee prosecutors and investigators for his private employer and other funds for his employer's private projects from each accused finds guilty such a bias that *Younger* abstention does not apply?

4. Is the employment, housing, training, providing of staffs, facilities expenses, offices, pay and benefits to a judge by privately financed party such a bias that *Younger* abstention does not apply?

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The parties are as follows:

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SUPREME COURT OF THE UNITED STATES

October Term, 1996

HOWARD G. JOHNSON,
Petitioner

vs.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, Et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the order of the Ninth Circuit Court of Appeals, docket no. 96-55233 entered on May 6, 1996. Appendix A.

Said order "upon the review of the record of the appellant's opening brief summarily affirm[ed]" the lower court dismissing the action pursuant to *Younger v. Harris*

401 U.S. 37 (1971). See **Hirsh v. Justices of the Supreme Court of California** 67 F.3d 708, 713-714 (9th Cir. 1995) (per curiam). It further ordered that "No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket." Exhibit A. The **Hirsh, supra,** decision is set forth at Exhibit B.

I.
ORDERS BELOW

The summary order of the Ninth Circuit Court of Appeals is reproduced at the appendix at A. The order of the U.S. District Court, Central District of California is reproduced in Appendix E.

II.
JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C.A. Sec. 2101(c). This Petition for Writ of Certiorari is timely filed within ninety days of the order of the Ninth Circuit Court of Appeals on May 6, 1996. Appendix A.

III.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV , Section 1: "No State shall...deprive any person of life, liberty or property without due process of

law, nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution

Article 6, section 1: "The judicial power of the State is vested in the California Supreme Court, the Courts of Appeal, the Superior Courts, and the Municipal Courts. All courts are courts of record."

Article 6, section 9: "The State Bar of California is a public corporation..."

Article 6, section 12: (a) "The California Supreme Court may... transfer a cause from itself to a court of appeal... The court to which the cause is transferred has jurisdiction."

Article 6, section 14: "The legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

Article 6, section 16: "(a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor... (b) Judges of other courts shall be elected in their counties or districts at general elections."

The state statutes at issue are California Business and Professions Code sections 6079.1, 6079.5, 6086.5,

6086.65(a), 6086.10 and 6086.13. They are set forth at Appendix C.

IV.
STATEMENT OF THE CASE

The California Supreme Court pursuant to a statute, created a State Bar, and a State Bar Court as a part of it, to license attorneys to practice. The California Supreme Court appoints and has appointed ten employees to the State Bar of California to be its judges. It also removes or reappoints these judges.

The State Bar of California is the prosecuting party in disciplinary proceedings. The appointed judges are employed, housed, trained, paid and provided their salaries, facilities, offices, retirement, and benefits by the State Bar of California and from its private funds. Those funds include the assessments they make upon finding attorneys guilty of professional misconduct. The judges and prosecutors are co-employees who are housed, trained, paid and provided their benefits from the same privately financed employer which is the exclusive financial beneficial of findings of guilt of accused attorneys.

The California State Constitution bars court creation by government. It reserves court creation exclusively to the registered voters. It requires all judges to courts be appointed by the Governor and subject to public election. The Petitioner is a registered voter and an attorney at law

for over seventeen years. He is a member of the bar of the United States Supreme Court. He has no record of discipline.

Compelled attorney members of the State Bar are excluded from participation in the State Bar's Court. They are the class of the accuseds.

Senior Judge Arthur Alarcon of the Ninth Circuit Court of Appeals accepted a position with the State Bar of California to head a Commission appointed by it to review the operations of the State Bar's Court while federal litigation was pending on this issue. That the appointment was made while litigation on this issue was pending before the federal courts may not have been a matter of coincidence. Thereafter, there were many state-wide articles about what is officially called the "Alarcon Report". The Judge was quoted as saying this system was fair. He made recommendations for improvement of the State Bar's Court. Exhibit D. Thereafter, three of Judge Alarcon's California colleagues were assigned to hear this attorney's appeal, resulting in the summary order and bar to any further papers being filed which also precluded raising the issue of the three California judges' possible recusal. Exhibit A.

"Section[s]" refers to sections of the California Business and Professions Code. "Rule[s]" refers to the California Rules of Professional Conduct.

REASONS FOR GRANTING THE WRIT

A. The Public and Active Participation of a Senior Ninth Circuit Judge for a Party concerning the Constitutional Issues Contaminated the Deliberations of his Colleagues in Refusing to Hear the Issues and Barring the Filing of any Pleadings.

This case of first impression indicates why the limitation on participation by a judge in advocacy of causes for may well-meaning and beneficial interests is a sound one. Had Ninth Circuit Senior Judge Arthur Alarcon not sat on this specific commission, which bears his name as the Alarcon Commission, reviewing, at the request of a party who had litigation in the Court in which he sat, the exact same program whose constitutionality was being challenged contemporaneously in the multimember tribunal in which he also sat and if he had not made public statements to the press about his views and opinions in support of this party's program and authored a report which bears his name for that party, this delicate case of first impression could not have arisen.

Many judges participate in bar association programs and activities without any possibility of any conflict of interest and do so in support of advancing the law and the administration of justice.

The first problem here is that this is not a bar association. This is not a participatory association of attorneys. It is a mandated State Bar of California which is created by the State legislature. It is a party to disciplinary proceedings. It is the prosecuting party. At the same time, this party created and runs its own claimed Court and employs, pays, houses, trains and provides all the staff, facilities, pay and benefits for its employee judges who determine which attorneys shall be sanctioned for alleged professional misconduct. It then assesses monies to pay to the privately financed party employing the judge so other programs may be created and paid for.

In Petitioner's Opening Brief to the Ninth Circuit, he stated, "This appeal addresses the unresolved issues of this Court's decision in **Hirsh v. Justices of the California Supreme Court, supra.** At the time of that decision, a Senior Judge of this Court was an active participant in the affairs of a party to the proceedings and a partisan in support of that party's position concerning the constitutional issues raised in **Hirsh, supra.** Because of the possibility of tribunal taint and contamination by said Judge's extrajudicial public participation and statements for and on behalf of the State Bar of California to those proceedings, Appellant is filing a Motion for the Recusal of the Ninth Circuit Court of Appeals Panel and its Chief Judge from assigning any judges to hear this appeal or sitting thereon." This statement resulted in the summary dismissal and bar to filing any

further papers by the Ninth Circuit Court of Appeals. Exhibit A.

By reason of the bar to filing anything further with the Ninth Circuit, the summary nature of the order, this Petition is requested to be entertained too determine if, under all these circumstances, this procedure denied to the Petitioner the due process of law and the equal protection of the law which is his due. See **Aetna Life Insurance Company v. La Voie** 475 U.S. 813, 89 L.Ed.2d 823; 106 S.Ct. 1580 (1988).

B. The Partisan Role of the California Supreme Court for the Prosecuting Party by it Appointing Employees to it and Awarding Money to their Appointees' Employer by Denying Hearing to Each Accused Poses Procedural Due Process Problems

Based on this Court's statement that the test is whether the situation offers a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, **Aetna Life Insurance Company v. La Voie, supra**, is not a situation where a State Supreme Court appoints employees to a prosecuting party to be its "judges," whose recommendations it the reviews, when the party employing its appointees is privately financed, and where by denying all petitions of all accuseds, it orders

monies paid as "costs" to reimburse the party for the salaries and benefits of not only its appointees to a party, but for their co-employees as well, and orders monies for its appointees' employer's private fund for its appointees to give out to the Public, such a situation of temptation to not hold the balance nice, clear and true, that a finding of bias within the California State Supreme Court Justices is required which warrants an application of an exception to *Younger* abstention by the federal courts?[1]

C. Administrative Adjudicators Selected, Hired and Employed by a Party is Bias Which Should bar Abstention

While the Ninth Circuit's order relies on its **Hirsh, supra**, decision, that decision did not address the employment of the judges by a party to the proceedings or the State Supreme Court's act of appointing employees to a party to be judges hearing and deciding the same party's cases. Refer Exhibit B.

Based on the non-application of *Younger* abstention to a judicial bias exception as set forth in **Gibson v. Berryhill** 411 U.S. 564, 578-79, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973), and pursuant to this Court's holding in **Ward v. Village of Monroeville** 409 U.S. 57, 34 L. Ed. 2d 267,

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[1] There is no Rule of Necessity. The California Constitution provides any case may be transferred by the California Supreme Court to a State Court of Appeals. Article 6, section 12, CA. Constitution.

93 S.Ct. 80 (1972), even if there were neutral review by the State Supreme Court, the fact that the adjudicatory proceedings in the lower levels lack a fair and impartial adjudicator denies to a party fundamental due process of law. A party has a constitutional right to a fair and impartial adjudicator in the first instance, *de novo* review being irrelevant.

Is not the employment, housing, training, providing of all staff, expenses, facilities, pay, and benefits for a judge by a privately financed party appearing before the judge such bias that *Younger* abstention does not apply?

D. Administrative Adjudicators Selected, Hired and Employed by a Party Which Is the Exclusive Financial Beneficiary of Findings Against Accuseds Is Bias Which Should Bar Abstention

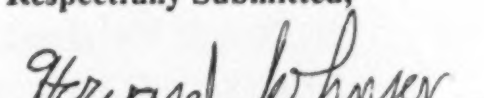
Three layers of awards are imposed on the attorneys adjudged guilty: the salaries and benefits of the judge and his co-employee prosecutor and investigators, sanctions to fund the State Bar Client Security Fund, and forced enrollment in sections, examinations, schools, classes owned and run by the State Bar. While **Hirsh, supra**, relied on hearsay claims that these sums were small, the State Audit now completed reveals those sums in five years exceeded fifteen million dollars. But is the amount important or the existence of the financial interest?

Proceedings conducted by members of a Board of a State Bar Association wherein they desired to recoup the Association's investigative costs by finding guilt of accuseds and imposing those costs upon the adjudged guilty attorneys were voided for lack of due process of law. **Matter of Ross** 656 P.2d 832, 838, 99 Nev. 1 (Nev. 1983).

CONCLUSION

By reason of the summary nature of the dismissal and the bar to filing any pleadings or papers once it was disclosed that t bias issue was to be addressed concerning the participation of a colleague with and for a party, the importance of addressing whether active participation by a State Supreme Court with and for a party is bias sufficient to warrant non-abstention and whether the employment of a judge by a privately financed party is also such bias, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



HOWARD JOHNSON
Petitioner *Pro Se*

VERIFICATION

I have read the foregoing Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals and state it is made on my own personal knowledge, information and belief, and this verification is executed this 15th day of October, 1996 at Los Angeles, California.

Respectfully Submitted,

Howard Johnson

HOWARD JOHNSON
Petitioner *Pro Se*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD G. JOHNSON, Plaintiff-Appellant,	)	No. 96-55233
	)	DC# CV-95-7356-KN
vs.	)	Central California
JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, ET AL., Defendants-Appellees	)	ORDER

Before: BROWNING, REINHARDT and FERNANDEZ, Circuit Judges

Upon review of the record and appellant's opening brief in this appeal, this court hereby summarily affirms the district court's January 26, 1996 order dismissing the action pursuant to Younger v. Harris, 401 U.S. 37 (1971). See Hirsh v. Justices of the Supreme Court of California, 67 F. 3d 708, 713-14 (9th Cir. 1995) (per curiam) (addressing and rejecting each of appellant's allegations relating to bias on the part of the California State Bar Court).

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

AFFIRMED

APPENDIX B

Hirsh v. Justices of the Supreme Court of the State of California 67 F.3d 708 (9th Cir. 1995)

STUART H. HIRSH, Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: MALCOLM L. LUCAS; EDWARD PANELLI; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD M. GEORGE; and DAN LUNGREN, State Attorney General & acting personally for his private appointee's financial gain; STATE BAR OF CALIFORNIA; ELLEN R. PECK, Employee of the State Bar as a claimed Judge; DAVID C. CARR, Employee Prosecutor of State Bar Association, Defendants-Appellees.

RALPH F. SERVER, Plaintiff-Appellant,

v.

SUPREME COURT OF THE STATE OF CALIFORNIA: STATE BAR OF CALIFORNIA, Defendants-Appellees.

HAROLD LEONARD PERRY, Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:
MALCOLM LUCAS, Chief; EDWARD PANELLI; STANLEY MOSK; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD GEORGE; and DAN LUNGREN; LISE PERLMAN, et al., Defendants-Appellees.

EDMUNDO B. ESPINOZA, Plaintiff-Appellant,

v.

MALCOLM LUCAS; HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA; KATHRYN MICKLE; STANLEY MOSK; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD GEORGE; and DAN LUNGREN, State Attorney General, Defendants-Appellees.

Nos. 94-55240, 94-55250, 94-55507 and 94-56335

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

March 7, 1995, Argued and Submitted, Pasadena, California

March 29, 1995, Filed

SUBSEQUENT HISTORY: The Publication Status of this Document has been Changed by the Court from Unpublished to Published September 7, 1995. Reported in Table Case Format at: 61 F.3d 910.

PRIOR HISTORY: Appeals from the United States District Court for the Central District of California. D.C. No. CV-93-04114-SVW, D.C. No. CV-93-06789-SVW, D.C. No. CV-93-06909-SVW. Stephen V. Wilson, District Judge, Presiding. Appeal from the United States District Court for the Southern District of California, D.C. No. CV-94-01299-MLH, Marilyn L. Huff, District Judge, Presiding.

COUNSEL: Stuart H. Hirsh and Ralph F. Server, Beverly Hills, California, Harold L. Perry, Oakland, California and

Edmundo Espinoza, San Diego, California, in pro per for the plaintiffs-appellants.

Robert M. Sweet, Marina del Rey, California, for the defendants-appellees.

JUDGES: Before: James R. Browning and Robert R. Beezer, Circuit Judges, and Ancer L. Haggerty, * District Judge.

OPINION: [*711]

PER CURIAM:

Facing pending attorney disciplinary proceedings in California, each appellant filed suit in federal court under 42 U.S.C. sec. 1983, alleging deprivation of various constitutional rights. The district court granted the government's motions to dismiss. We affirm.

I. Background

A. The California Attorney Disciplinary System

Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code sec. 6086.5. The Bar Court is divided into a Hearing Department and a Review Department. Id. secs. 6079.1, 6086.65. Disciplinary proceedings are commenced by serving the accused attorney with a Notice to Show Cause. The Hearing Department then conducts a formal adversarial hearing during which the accused attorney and a State Bar

* Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.

prosecutor present evidence before a Bar Court judge. The Hearing Department makes findings and a recommendation regarding appropriate discipline. The attorney may appeal to the Review Department, which reviews the Hearing Department's findings de novo and makes its own recommendation. The attorney may then file a petition for [*712] review with the California Supreme Court. [n1] Id. sec. 6082. The Supreme Court either grants review and issues a final order or denies review, in which case the Bar Court's recommendation is filed as an order of the Supreme Court. Id. Sec. 6084; Calif. Court Rule 954. Throughout this process, the Supreme Court retains inherent jurisdiction over attorney discipline matters. Id. 951 (g).

B. The Federal Suits

Each of the suits named as defendants the Justices of the California Supreme Court, the State Attorney General, the State Bar, the Bar Court, and the respective Bar Court judges and prosecutors involved. The appellants sought an injunction to stop the pending disciplinary proceedings, a declaratory judgement that the disciplinary system is unconstitutional, and monetary damages based on alleged deprivations of state and federal constitutional rights. The complaints allege that the disciplinary system deprives appellants of various constitutional rights, including due

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[n1] If no petition for review is filed, the Bar Court's recommendation becomes a final order of the California Supreme Court, although thee Supreme Court may review the recommendation on its own motion. Id. sec. 6084; Calif. Court Rule 953(b).

process, equal protection, the right to vote, and the right to court access. The district court dismissed each case on the ground that *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (1971), required abstention.

II. Abstention from Granting Injunctive and Declaratory Relief

A. Requirements for Abstention

Younger and its progeny generally direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. Id. at 40-41; *Samuels v. Mackell*, 401 U.S. 66, 73, 27 L. Ed. 2d 688, 91 S.Ct. 764 (1971) (extending *Younger* to declaratory judgements). Absent "extraordinary circumstances", abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S.Ct. 2515 (1982). Each prerequisite is satisfied in each of these cases.

1. Ongoing State Proceedings

Each appellant faced ongoing disciplinary proceedings when he brought suit in federal court. See *Beltran v. State of California*, 871 F.2d 777, 782 (9th Cir. 1988) (stating that abstention requires proceedings to be ongoing at the time plaintiff initiates federal proceedings). Notices to Show Cause had been directed to Hirsh and Espinoza, and

the California Supreme Court had not yet filed an order regarding the Bar Court's recommendations with respect to Perry and Server. Se *Flangas v. State Bar of Nevada*, 655 F.2nd 946, 949 (9th Cir. 1981) (holding proceedings were ongoing where state Board of Bar Governors had recommended discipline but final binding action had yet to be taken by the Nevada Supreme Court).

The ongoing proceedings were judicial in character. Under California's discipline system, the Hearing Department conducts a formal hearing and make findings, the Review Department conducts a de novo review of those findings, and the Supreme Court retains inherent jurisdiction over the proceedings, including power to review the Bar Court's findings. Appellants point to no relevant distinction between this procedure and that held to be judicial in nature in *Middlesex*, 457 U.S. at 433-34; see also *Partington v. Gedan*, 880 F.2d 116, 122 (9th Cir. 1989) (attorney disciplinary proceedings conducted by an ethics committee or its equivalent under the auspices of the state supreme court are judicial for purposes of *Younger*).

2. Important State Interests

California's attorney disciplinary proceedings implicate important state interests. See *Middlesex*, 457 U.S. at 434 ("The State...has an extremely important interest in maintaining and assuring [*713] the professional conduct of the attorneys it licenses.").

3. Opportunity to Present Federal Claims

The California Constitution precludes the Bar Court from considering federal constitutional claims. See Calif. Const. art. III, sec. 3.5 However, such claims may be raised in judicial review of the Bar Court's decision. This opportunity satisfies the third requirement of Younger. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629, 91 L.Ed. 2d 512, 106 S.Ct. 2718, 2723-2724 (1986); *Kenneally v. Lungren*, 967 F.2d 329, 332 (9th Cir. 1992).

Appellants contend their opportunity for judicial review is inadequate because it is wholly discretionary.[n2] Judicial review is inadequate only when state procedural laws bars presentation of the federal claims. See *Partington*, 880 F.2d at 123; accord *Moore v. Sims*, 442 U.S. 415, 430 & n.12, 60 L.Ed. 2d 994, 99 S.Ct. 2371 (1979) (finding abstention appropriate because state law did not impose procedural barriers to raising constitutional claims). The fact that review is discretionary does not bar presentation of appellants' federal claims - appellants can raise the claims in a petition for review. See *Beltran*, 871

[n2] Hirsh also argues that the California Supreme Court's summary denial of his interim motion precluded judicial review of his federal claims. This contention is meritless - Hirsh can raise those claims in his petition for review following the conclusion of disciplinary proceedings in the Bar Court and has stated his intention to do so. See *Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512, 515 (2nd Cir. 1990) (a state court's "refusal to halt the [attorney disciplinary] inquiry at its incipient stage provides no basis for believing that [the court] will be reluctant to entertain any legitimate objections [the attorney] may have in the event that disciplinary sanctions are improperly imposed").

F.2d at 781, 783 (opportunity *713 to present federal claims in a petition for writ of review is sufficient to trigger Younger abstention, even though the court of appeal simply "denied the petition without elaboration"); *Martori Bros. Distribs. v. James-Massengale*, 7781 F.2d 1349, 1352, 1354 (9th Cir.), amended on other grounds, 791 F.2d 799 (9th Cir. 1986) (opportunity to raise federal claims in petition for review satisfied the requirements of *Younger* even though a reviewing court could deny the petition summarily); *Fresh Int'l Corp. v. ALRB*, 805 F.2d 1353, 1362 (9th Cir. 1986) (finding abstention applicable because plaintiff "could have presented [its federal claim] to the court of appeal in its petition for review").

The California Supreme Court's rules state that Bar Court decisions will be reviewed "when it appears....necessary to settle important questions of law." Calif. Court Rule 954 (a). The court has considered federal constitutional challenges to the attorney disciplinary procedure. See, e.g., *Lebbos v. State Bar*, 53 Cal.3d 37, 48, 278 Cal. Rptr. 845, 806 P.2d 317 (1991). Refusing to abstain would require presuming that the California Supreme Court will not adequately safeguard federal constitutional rights, a presumption the U.S. Supreme Court squarely rejected in *Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520-2521. Accordingly, the third requirement for Younger abstention test was satisfied.

B. Applicability of Exceptions to Abstention

1. Bias

Although a federal court is normally required to abstain if the three prongs of the *Younger* test are satisfied, abstention is inappropriate in the "extraordinary circumstance" that the state tribunal is incompetent by reason of bias. See *Gibson v. Berryhill*, 411 U.S. 564, 577-79, 36 L.Ed. 2d 488, 93 S.Ct. 1689 (1973). However "one who alleges bias 'must overcome a presumption of honesty and integrity in those serving as adjudicators." *Kenneally*, 967 F.2d at 333 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975). Appellants failed to overcome this presumption.

Appellants contend California Supreme Court justices and Bar Court judges have a direct and substantial financial interest in the outcome of disciplinary hearings. See *Aetna Life Ins. Co. v. La Voie*, 475 U.S. 813, 824-25, 89 L.Ed. 2d 823, 106 S.Ct. 1580 [*714] (1986). However, appellants offer no evidence that the justices or judges receive improper payments to influence attorney disciplinary proceedings or that they are competitors who might have a financial interest in seeing appellants disbarred. See *Gibson*, 411 U.S. at 577-79 (optometrists who sat on licensing board were biased because of their financial interest in the outcome of hearings to revoke the license of optometrists with whom they competed).

The fact that fines imposed in attorney disciplinary proceedings are paid to the treasury of the State Bar does

not establish an impermissible financial interest. Although the State Bar pays the salaries of the Bar Court judges, the salaries are set by statute, see Cal. Bus. & Prof. Code Sec. 6079(d), and no evidence suggests that they are in any way dependent on the amount of fines collected or that the State Bar would be unable to pay the salaries of Bar Court judges without the money collected in disciplinary proceedings, which totals less than 1% of the State Bar's revenues. [n3]

Appellants offer only conjecture in support of their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. As the district court noted, district court judges are not deemed incompetent to review the findings of magistrate judges whom they participate in appointing. Compare *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 779-80 & n. 10 (9th Cir. 1982) (school board reviewing its own prior decision was not impermissibly biased).

The absence of a mandatory statutory recusal mechanism applicable to justices of the California Supreme Court does not make a showing of bias unnecessary. The case upon which the appellants rely, *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), held only that the

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[n3] This fact distinguishes the present case from *In the Matter of Ross*, 99 Nev.1, 656 P.2d 832 (Nev. 1983), in which the Nevada attorney disciplinary system was deemed to violate due process in part because disciplinary fines were a crucial source of revenues for the State Bar. 656 P.2d at 836. Moreover, the adjudicators under the Nevada system were the State Bar Board of Governors, who were also responsible for the financial integrity of the bar. Id. No such comingling of functions exists under the California disciplinary system.

court would not consider the bias exception to Younger because the plaintiff had not exhausted his state court remedies by invoking the available statutory recusal procedure. See id. at 950. *Flangas* did not imply that the absence of a particular recusal mechanism made it unnecessary to consider whether bias existed in fact.

Finally, appellants suggest the disciplinary process is tainted by bias because the State Bar has both investigative and adjudicative functions. However, the Supreme Court has rejected the contention that such a combination necessarily creates an unacceptable risk of bias. Such decision makers are still entitled to a presumption of honesty and integrity when serving as adjudicators. See *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464-1465. Appellants offer does not evidence to rebut this presumption.

2. Patent Unconstitutionality

We reject appellants' contention that abstention is inapplicable because the California disciplinary system allegedly involves an unconstitutional delegation of power, violates separation of powers, and deprives appellants of a right to vote. [n4] The California Supreme Court has previously rejected similar constitutional challenges on the ground the Bar Court functions as an administrative arm of the Court, which maintains final authority over discipline.

[n4] It is unclear whether any of these claims state a violation of a federal, as opposed to a state, constitutional guarantee. We need not reach that issue.

See *Lebbos v. State Bar*, 53 Cal.3d 37, 48, 278 Cal. Reptr. 845, 806 P.2d 317 (1991). In any case, regardless of the ultimate merits of these claims, the pertinent statutes are not "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. "*Younger*, 401 U.S. at 53-54, 91 S.Ct. at 755 (quoting *Watson v. Buck*, 313 U.S. 387, 402, 85 L.Ed. 1416, 61 S.Ct. 962 (1941). [*715] Accordingly, any violation would not justify refusal to abstain.

III. Dismissal of Claims for Monetary Relief

All of the defendants are immune from liability for monetary damages. [n5] The eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court. See *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985). This immunity extends to the individual defendants acting in their official capacities. See *Pena v.*

[n5] The district court relied on *Younger* abstention as its basis for dismissing the monetary claims. However, the applicability of *Younger* abstention to appellants' monetary claims is unclear. Compare *Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) (abstaining in a sec. 1983 action because "such an action would have had a substantially disruptive effect upon ongoing state [] state proceedings") with *Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 816-17 (9th Cir. 1989) (suggesting that abstention is inappropriate where ongoing state proceeding afforded no opportunity for the plaintiffs to receive monetary relief); see also *Deakins v. Monaghan*, 484 U.S. 193, 202, 98 L.Ed.2d 529, 108 S.Ct. 523 (1988) ("The District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding.") We decline to address the issue here.

Gardner, 976 F,2d 469, 472 99th Cir. 1992); see also *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 361-62, 116 L.Ed. 2d 301 (1991) (holding that a defendant official acting in his official capacity receives the same immunity as the government agency to which he belongs).

The individual defendants are also immune in their individual capacities. The justices of the California Supreme Court have absolute immunity for their role in reviewing the recommendations of the Bar Court. See *Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 565-66 (9th Cir. 1990). They are also entitled to absolute legislative immunity for actions relating to the promulgation of disciplinary rules. See *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734, 64 L.Ed. 2d 641, 100 S.Ct. 1967 (1980).

The Bar Court judges and prosecutors have quasi-judicial immunity from monetary damages. Administrative law judges and agency prosecuting attorneys are entitled to quasi-judicial immunity so long as they perform functions similar to judges and prosecutors in a setting like that of a court. *Butz v. Economou*, 438 U.S. 478, 511-17, 57 L.Ed. 2d 895, 98 S.Ct. 2894 (1978). The factors cited by the *Butz Court* apply equally to the personnel of the Bar Court - hearings are adversarial, errors are correctable on appeal, the judges make factual findings and perform other adjudicatory functions, and Bar Court decisions are controversial enough to stimulate harassing damage actions against the adjudicators, as this case illustrates. See id.

Thus, the Bar Court judges and prosecutors are immune from damages. See *Clark v. State of Washington* 366 F.2d 678, 681 (9th Cir. 1966) (holding that Bar Association prosecuting attorney was entitled to immunity).

Finally, the California Attorney General is entitled to absolute prosecutorial immunity for his limited role in the disciplinary system. *See Imbler v. Pachtman*, 424 U.S. 409, 427, 47 L.Ed. 2d 128, 96 S.Ct. 984 (1976).

IV. Espinoza's Recusal Motion

Judge Huff did not abuse her discretion by denying the motion for recusal. She is not a member of the State Bar and noted that the California Constitution forbids such membership. Cal. Cont. art. VI, sec. 9. Although Judge Huff occasionally participated in State Bar activities, she was not paid, except for reimbursement of expenses. We reject Espinoza's contention that, "a reasonable person with knowledge of all the facts would conclude that [Judge Huff's] impartiality might reasonably be questioned." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).

AFFIRMED.

APPENDIX C

California Business and Professions Code

State Statutes

THE STATE BAR ACT

California Business and Professions Code

Sec. 6001. STATE BAR; PERPETUAL SUCCESSION; SEAL; REVENUE; POWERS; LAWS APPLICABLE

The State Bar of California is a public corporation. It is hereinafter designated as the State Bar...No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of the state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with section 11000), Division 4 (commencing with section 16100), and Part 1 (commencing with section 18000) and Part 2 (commencing with section 18500) of Division 5, of Title 2 of the Government Code, shall be applicable to the State Bar, unless the legislature expressly so declares. (Origin: State Bar Act, sec. 2. added by Stats. 1939, ch 34. Amended by Stats. 1957, ch. 1526; Stats. 978, ch 380; Stats. 1988, ch 1149.)

Sec. 6079.1 STATE BAR COURT HEARING JUDGES

(a) The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court...

(b) Judges of the State Bar Court appointed under this section shall not engage in the private practice of law...

(c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge, and submit its nominations to the Supreme Court, unless otherwise directed by the Supreme Court...

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities. Sec. 6079.5 CHIEF TRIAL COUNSEL; APPOINTMENT; TERM; QUALIFICATIONS

(a) The board shall appoint a lawyer admitted to practice in California to serve as chief trial counsel...Sec. 6086.5 STATE BAR COURT; ESTABLISHMENT; POWERS; RULES

The board of governors shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of section 6007 to the extent provided by rules adopted by the board of governors pursuant to this chapter...

Sec. 6086.65 STATE BAR COURT REVIEW DEPARTMENT

(a) There is a Review Department of the State Bar Court which consists of the Presiding Judge of the State Bar Court, one Lay Judge, and one Review Department Judge. The judges of the Review Department shall be nominated,

appointed and subject to discipline as provided by subdivision (a) of Section 6079.1, and shall be compensated as provided for the Presiding Judge by subdivision (d) of section 6079.1. However, the Lay Judge, who shall be a person who has never been admitted to practice law before in any court in the United States, and the Review Department judge may be appointed to, and paid as, positions occupying one-half the time and pay of the Presiding Judge. Candidates shall be rated and screened by the board as provided in subdivision © of Section 6079.1....

Sec. 6086.10 PAYMENT OF COSTS OF DISCIPLINARY PROCEEDINGS

(a) Any order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs. In any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs.

(b) The costs required to be imposed pursuant to this section include all of the following:

(1) The actual expense incurred by the State Bar for the original and copies of any reporter's transcript of the State Bar proceedings, and any fee paid for the services of the reporter.

(2) All expenses paid by the State Bar which would qualify as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be "reasonable costs" of investigation, hearing and review.

These amounts shall serve to defray the costs, other than the fees for the services of attorneys or experts, of the State Bar in the preparation or hearing of disciplinary proceedings, and costs incurred in the administrative processing of the disciplinary proceedings and in the administration of the client security fund...

(d) In the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State Bar in the amount determined by the State Bar to be reasonable expenses, other than fees for attorneys or experts, of preparation for the hearing. (Added by Stats. 1986, ch 662.)

Sec. 6086.13 IMPOSITION OF MONETARY SANCTION IN DISCIPLINARY MATTER

(a) Any order of the Supreme Court imposing suspension or disbarment of the member of the State Bar,...may include an order that the member pay a monetary sanction not to exceed five thousand dollars ($5,000) for each violation, subject to a total limit of fifty thousand dollars.

(b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.

...(d) The authority granted under this section is in addition to the provisions of Section 6086.10 and any other authority to impose costs or sanctions...

APPENDIX D

Some of the Press Articles to and about Ninth Circuit Court of Appeals' Senior Judge Arthur Alarcon's Participation with a Party

The Recorder, June 16, 1995, Friday, Pg. 1 (2 of 16 stories)
Making the Punishment Fit; A proposal by a State Bar task force would give wayward lawyers a better idea of the discipline measures they face

by MICHAEL GEBHARDT

California attorneys beware: Tougher punishments for professional misconduct are in the works. A task force convened by the State Bar's Office of Chief Trial Counsel today will finalize a draft proposal recommending that the State Bar Court adopt sentencing guidelines akin to those used by federal courts, according to task force chairwoman Tracy Genesen. The proposal will be sent to the Bar's Board of Governors Discipline Committee in time for its July 1 meeting. The move is the Bar's latest response to a scathing report issued last August by the Discipline Evaluation Committee, which spent a year reviewing the Bar's discipline system. Besides lambasting the system as bloated and inefficient, **the DEC specifically questioned whether certain disciplinary standards were strict enough. "We asked that there be permanent disbarment for certain kinds of crimes, and that there be immediate suspension for other kinds of crimes," said the DEC's chairman, Ninth Circuit U.S. Court of Appeals Judge Arthur Alarcon, in an interview last week. "The thrust of the commission's**

recommendations was to protect the public and the client. We were concerned that the thrust that had been developed under the law, and the perception that the State Bar Court had, was that there was a need to protect the lawyer."
(emphasis added)

The Bar developed disciplinary standards in the mid-80s, but State Bar Court judges still have almost unlimited discretion in choosing penalties. According to Chief Trial Counsel Judy Johnson, the disciplining of attorneys has been overly dependent on the facts of a case.

"In California, to figure out what sentence an attorney should get, you have to go back and read a series of decisions in which they weigh a variety of factors to decide this issue," says Johnson.

" In our view, this is too cumbersome a process, and it has resulted in a lack of predictability in sentencing. Twice this year, in fact, the California Supreme Court has reviewed this disciplinary decisions of the State Bar Court, in both cases questioning whether the penalties were strict enough. The court acted on its own motion to take up In re John Michael Brown, S0466753, while in In re Ivan Morse, S041048, it responded to the petitioner's claim that his sentence was too strict by asking him to brief the issue of whether his sentence was too strict by asking him to brief the issue of whether his sentence was in fact too light. The Supreme Court is the final arbiter of attorney discipline in

the state, and has the power to review all decisions of the State Bar Court.

The task force proposal doesn't address all of the issues raised by the **Alarcon commission** (emphasis added), however. Rather than dictate specific punishments - such as disbarment or suspension - the guidelines merely outline the criteria Bar Court judges should use sentencing, and give them less leeway for leniency in certain cases. According to Genesen, the commission's disbarment and suspension concerns are being dealt with in separate proposals.

Eventually, Genesen hopes to have the proposal endorsed by the Supreme Court. "We are presenting the proposal as a rule of court, which means the Supreme Court can make it binding on the State Bar Court by approving it," she says. "But we don't want to appear to be enforcing our will on the Supreme Court. We're still working out how best to approach this."

Not everyone agrees that the standards are in need of an overhaul, however. Doron Weinberg or Weinberg & Wilder, who has defended attorneys before the State Bar for 20 years, says, "The current standards are workable for the most part, and provide some degree of flexibility. There has been a fair amount of pressure to make them more stringent, which I don't think it is appropriate.

FORMULATED APPROACH

The office of Trial Counsel, which the Bar established in 1986, is charged with investigating and prosecuting complaints about lawyers. The sentencing task

force, which was formed in February, includes four members of the Trial Counsel's staff, two from the Office of the General Counsel, a staff member from the State Bar Court and one public members of the Board of Governors. According to Genesen, who is an attorney and special assistant to Chief Trial Counsel Johnson, the rules' similarity to federal sentencing guidelines will provide " a more formulated approach."

The proposal classified discipline options in three levels. The middle level is the standard sentence for a given infraction; the upper, more punitive level is activated if aggravating circumstances are found; and the lower level can be imposed in cases with mitigating factors.

The proposal also attempts to refine the standards for mitigation of attorney misdeeds, as well as define some aggravating circumstances that will require mandatory enhancement.

"We used the current aggravating factors already defined in the existing standards," says Genesen. "We pulled the ones for which we agreed there should be no discretion but to go to the upper level of discipline. The court would still have discretion within the upper range."

For example, an attorney found guilty of incompetence would normally receive the requisite mid-range sentence. But one who was also representing a particularly vulnerable client would recieve a stricter sentence.

But Weinberg says the federal sentencing guideline model is a bad one. "The federal sentencing guidelines have bred a fair amount of injustice, treating people as objects to be pigeon-holed."

Genesen, however, is confident that the task force is on the right track. She reiterated that the court's approach during arguments in Morse was in line with the reform proposal's approach.

But the defense bar disputes the significance of the court's action in the Brown and Morse ccases. Solo practitioner Jerome Fishkin asserts that the justices didn't send any coherent message regarding a need for stricter disciplinary standards.

"The fact that the Supreme Court is looking at two State Bar cases is really not terribly relevant," says Fishkin, a former Bar prosecutor who now represents lawyers in discipline cases. "The court has reviewed many discipline cases in the 10 or so years that the standards have been in existence. In some of those they reduced the punishment, and in some others they increased it. Let's not read too much into the Brown case."

LOOKING FOR CONSISTANCY

While the Bar's primary goal seems to be tougher discipline standards, James Towery, chairman of the Board of Governors' Discipline Committee, says that uniformity is another aim of the revision.

"Now that we've had six years of operation with the professional court, we have not seen the predictability that

we had hoped," says Towery, a partner at Hoge, Fenton Jones & Appeal in San Jose.

But solo Daniel Drapiewski, who has practiced Bar discipline defense since 1981, says the quest for consistency is misguided. "I've seen these things come down from Trial Counsel as often as phases of the moon, and they generally don't work," says Drapiewski. "Within a year of those guidelines being law, there's going to be a situation that doesn't fit, and everyone's going to be scurrying to find a reason not to apply them."

Fishkin also criticized the Bar's failure to include defense lawyers in its task force. "A task force on discipline without defense counsel - what bullshit," he says. Genesen sounded unfazed by such criticism. "When the proposal is finished," she says, "they will have a chance to comment."

Genesen says copies of the proposal will be available after June 26. If the Discipline Committee approves the draft, she says, the State Bar will solicit public comment and the document will go back to the committee and the full Board of Governors. Last-minute revisions are still possible, with the task force set to meet today before sending the proposal to the Discipline Committee. Genesen, who will chair that meeting, says he is "cautiously optimistic" the proposal will be adopted by the committee, the full Board and eventually the Supreme Court.

Defense counsel Fishkin would like to see Genesen's hopes dashed. "I hope that the [Supreme Court] will recognize that...tougher discipline does not prevent crime.

It just adds to the problem. If you kick enough people while they're down, some of them won't get up."

GRAPHIC: Picture 1, JUDY JOHNSON: The Bar's chief trial counsel says the current system is "too cumbersome" and has "resulted in a lack of predictability in sentencing." MAYA ALLERUZZO; Picture 2, DORON WEINBERG: "The current standards are workable for the most part, and provide some degree of flexibility," said the defense lawyer. RECORDER FILE (1990)

The Recorder, April 12, 1995, Wednesday, Pg. 3 (3 of 17 STORIES)

Bar Governors Approve Discipline Audit Panel

by HANNAH NORDAUS

Vowing to improve the much-maligned discipline system for California's lawyers, the State Bar's board of governors has elected to establish a new Discipline Audit Panel in place of the complainants' Grievance Panel.

The vote - which represents the discipline system's first major shake-up since it was overhauled in 1989 - was taken over the weekend at a meeting in Los Angeles. Besides hearing testimony on the progress of reforms in the Bar prosecutor's office, the governors also voted to enhance certain punishments for errant lawyers and to streamline procedures for investigating complaints of lawyer wrongdoing.

The proposal to replace the complaint panel with the audit panel now goes to the Legislature for approval.

The grievance panel was set up to hear appeals from people who believe their complaints against lawyers had not been properly handled by the Bar's Office of Chief Trial Counsel. The audit panel, which is to be staffed by current members of the grievance panel, would not allow consumers to appeal closed cases, insted conducting random and selective case audits to evaluate how Bar investigators resolve complaints. Officials estimate the new panel will use about the same amount of resources budgeted for the grievance panel this year: 13 full-time staffers and about $1.2 million.

TRIAL COUNSEL MOVES AHEAD

The Office of Chief Trial Counsel, meanwhile, reported to the board that it has adopted a "Statement of Commitments to Complainants," pledging to keep consumers apprised of investigations. Prosecutors hope that better communication will lead to more satisfaction among legal consumers, and avoid the misunderstandings that prompt appeals.

Much of the Bar's restructuring was spurred by findings of the Discipline Evaluation Committee headed by Ninth Circuit U.S. Court of Appeals Senior Judge Aurthur Alarcon (emphasis added). The DEC issued a scathing report in August that called the system costly, inefficient and often unresponsive to consumers.

Among its recommendations, the DEC suggested the Bar do away with the grievance panel and cut the staff of the State Bar Court. If the cuts are endorsed by the

board at its next meeting in May, 13 of 78 court staffers will let it go. In March, the Office of Investigations eliminated five middle-manager jobs following the **Alarcon committee's recommendation.** (emphasis added)

Indeed, while the State Bar Court has grudgingly cooperated in the proposed restructuring, Chief Trial Counsel Judy Johnson's plan to revamp her office has in some cases exceeded the DEC's recommendations. The reform package Johnson presented to the board of governors on Saturday, for example, includes "strike teams" of investigators and prosecutors who work together on cases involving particularly egregious accusations, or lawyers who are subjects of numerous compaints. Johnson also has asked that Bar to streamline the sytem by enhancing punishments for some flagrant crimes while diverting the less serious ones to mediation. Along those lines, the governors voted to double from five years to 10 years the length of time disbarred attorneys must wait before applying to the California Supreme Court for reinstatement. The proposal will now be circulated for public comment and is expected to return to the board for a vote by the end of the year.

In addition, the board heard a report from The Commission on the Future of the Legal Profession and the State Bar of California, which has spent the last 18 months - and a budget of $250,000 - to analyze where the profession is headed and whether membership in the Bar should remain mandatory. As predicted, the commission found that the

Bar should continue in its present form. Seven of the 30 commission members issued their own minority report, however, arguing that the Bar should become a voluntary association.

The Recorder, April 7, 1995, Friday, Pg. 1 (4 OF 17 STORIES)

Bar to Vote on Grievance Panel; Governors expected to replace consumer appeals system with an audit and oversight committee

by HANNAH NORDHAUS

Since 1987, people who have seen their complaints about lawyers dismissed by the State Bar have had a chance to resurrect their charges before the Bar's Complaints Grievance Panel. But if the Bar discipline committee chief James Towery has his way, the panel will soon be a thing of the past.

Today, the Bar's standing committee on discipline will vote on whether to do away with the panel, which critics have charged is ineffective and offers false hope to complainants that their cases will result in discipline. The full board of governors is slated to vote on the proposal Saturday, and Towery says he expects to be in Sacramento next week proposing the necessary statutory changes to the Legislature.

Even if the proposal passes, however, eliminating the grievance panel may not save any money because the governors may also vote to reincarnate it as a "Discipline

Audit Panel." The successor panel would conduct one random and one selective annual audit of cases closed by Bar prosecutors and would have a role in monitoring the Office of Trial Counsel's operations. Bar officials estimate the new bureaucracy will use approximately the same amount of resources budgeted for the current year: 13 full-time staffers and about $1.2 million a year. They add that they hope to pare costs in the future.

The Legislature established the panel in 1987 to monitor the Office of Trial Counsel's responsiveness to consumers, and to hear consumer appeals of rejected complaints. But since its inception the panel, which consists of three lawyers and four public members, has recommended that charges be brought or admonitions be issued in only 1 percent of the cases it has reviewed.

The impetus for dropping the grievance panel was a report issued in August by the Discipline Evaluation Committee, a blue-ribbon panel formed to examine the Bar's system for prosecuting errant lawyers. It was headed by Ninth Circuit Senior Judge Arthur Alarcon. After nearly a year of review, Alarcon committee suggested several ways to trim fat and serve consumers more effectively. (emphasis added). One conclusion was that the grievance panel should be replaced by a new consumer advocate's office that would assume the panels' audit duties. The report recommended that the complaints' appeal process be eliminated altogether.

"The appeal procedure raises false expectations for almost every person who seeks reinvestigation of his or her complaint by appealing," the report said. When the Bar's discipline committee took up the recommendation in December, it initially votes to do away with the panel altogether. But subsequent discussions led the committee to conclude that the panel still needed to exist in some form.

OTHER BUSINESS

On Saturday, the board of governors will also be voting on another Alarcon committee recommendation, (emphasis added) this one to reduce the State Bar Court's 79-member staff by 14. Half of those 14 positions are already vacant. The board will also receive the final report and recommendations of the Commission on the Future of the Legal profession, another blue-ribbon panel designated to examine the Bar's workings.

The Recorder, March 29, 1995, Wednesday, Pg. 3 (5 OF 17 STORIES).

Kopp Bill Proposes Audit, Membership Vote for Bar

by BILL AINSWORTH SACRAMENTO

Lawyers can no longer hope to see their bar dues reduced by more than 20 percent next year.

State Sen. Quentin Kopp on Tuesday agreed to change a bill that would have slashed State Bar due by $100. Now his bill would require the Bar to submit to an audit and to conduct a vote among all its members about

whether membership should remain mandatory. The Bar would have to pay for both the audit and the plebiscite.

The Senate Judiciary Committee, which discussed the bill on Tuesday, plans to vote on the amended version next week. Kopp, a San Francisco independent, introduced SB 60 in response to an August 1994 report on the Bar's discipline system. **A commission headed by retired Ninth Circuit Judge Arthur Alarcon had criticized the $40 million-a-year discipline system as expensive and wasteful.** (emphasis added).

Kopp acknowledged that while he wanted to cut dues, he had no justification for seeking the $100 reduction. "It's an arbitrary number," he said. Kopp added, however, that after the Bar's $69 million budget is audited - assuming of course, that his bill is passed and signed by Gov. Pete Wilson - he hopes to come back with recommendations for specific dues cuts.

State Bar officials seemed relieved over the changes, but they still worried about having to pay the cost of an audit and the membership plebiscite. Together, the audit and the election could cost up to $500,000.

"At first blush, it sounds good...," said Bar president Donald Fischbach. "But it's a tremendous burden when we're trying to cut costs." The Senate Judiciary Committee, which discussed the bill on Tuesday, plans to vote on the amended version next week. Fischbach also warned that a plebiscite question would have to be carefully crafted and explain the alternatives to a mandatory bar. Even if

mandatory membership is abolished, he said, lawyers would still have to pay for a licensing and discipline system.

By agreeing to change his bill early in the hearing, Kopp curtailed debate about whether the $478 a year the bar charges its members is adequate or too high.

Still, Peter Keane, a Bar governor who is chief assistant public defender in San Francisco, told the Judiciary Committee that dues are too expensive.

"It has an enormous punitive effect on young lawyers and lawyers putting together a small practice," he testified.

The Bar's own dues proposal is being carried by Assembly Speaker Willie Brown Jr., and would keep dues at the current level for the next two years.

Bar officials say the dues are needed to operate an efficient system for policing lawyers and protecting the public. In addition, they argue that because of inflation, a dues freeze will require program cuts. Brown's bill, AB 1435, will be heard next month.

The Recorder, March 14, 1995, Tuesday, Pg. 3 (6 OF 17 STORIES)

Bar Discipline Committee Votes Against Disbarment

by HANNAH NORDHAUS

If the State Bar's policy debates sometimes seem like a battle between lawyers' interests and the public interest, then lawyers should rejoice in the two visitories they chalked up over the weekend.

The board of governors on Saturday approved one proposal to impose a five-year statute of limitations on lawyer peccadilloes, one day after the Bar's committee on discipline unexpectedly voted down a proposal to permanently disbar attorneys who are found guilty of egregious misconduct.

The committee's proposal was based on a recommendation in last August's discipline evaluation committe report, which suggested changes and cuts in the Bar's discipline system after nearly a year of study. **The committee, headed by Seinor Judge Arthur Alarcon of the Ninth Circuit U.S. Court of Appeals, proposed that the Bar permanently disbar attorneys for "egregious" misconduct - such as stealing from clients - or any felony conviction.** (emphasis added)/(7 OF 17 STORIES)

Thè Recorder, January 4, 1995, Wednesday, Pg. 3

Kopp Bill Would Slas Bar Dues by $100 a Year

by BILL AINSWORTH SACRAMENTO BODY:

State Sen. Quentin Kopp has introduced legislation that would slash annual bar dues for most lawyers by $100 and require the State Bar to poll its members on whether the organization should switch from being mandatory to voluntary. "I don't think the public or lawyers need a mandatory State Bar," Kopp said in an interview Tuesday. "There are other states that operate discipline systems more effectively and efficiently."

The San Francisco independent also suggested that the task of disciplining lawyers be taken out of the hands of the Bar and given to another state agency, such as the Administrative Office of the Courts. New York, for example, operates its discipline system that way.

Senate Bill 60 follows some of the recommendations of the committee headed by Ninth Circuit U.S. Court of Appeals Judge Arthur Alarcon (emphasis added), which examined the Bar's discipline system. In a report issued Aug. 27, the Alarcon (emphasis added) committee concluded that the Bar's system for disciplining errant lawyers was bloated and inefficient, calling it "goldplated" and "redundant". Not surprisingly, the State Bar Court, which is involved in the discipline program, disagreed and issued a 40-page response in favor of the status quo. (emphasis added).

The Recorder, December 30, 1994, Friday, Pg. 10 (8 of 17 stories)

Critiquing the Bar's "Gold Plated" Discipline System

When a Committee headed by Ninth Circuit U.S. Court of Appeals Judge Arthur Alarcon released its findings on the State Bar's discipline system (emphasis added) in August, the report rocked the Bar to its petrified foundations. **Alarcon** (emphasis added) and his committee of 11 judges, lawyers and public members pulled no punches in their assessment of the system's "gold plated"

operations, tagging it an exercise in excess. **Alarcon** (emphasis added) did credit the system with making some progress. Before reforms were put in place in 1989, he said, the discipline backlog was like a "firestorm" that required a battalion of firefighters. Today it's more like isolated outbreaks - but the Bar has kept the same level of staffing.

Before the report was released, noting that the committee consisted entirely of "volunteers who serve and leave," "The advantage the [Bar] staff has is they're going to be around to argue for their case, and we're just dabblers."

Still, in contrast to the many State Bar "blue-ribbon panels" which simply justify the Bar's existance, **Alarcon** (emphasis added) and his committee had the backbone to step in and cast a critical eye on the Bar.

GRAPHIC: Picture, JUDGE ARTHUR ALARCON (emphasis added): "The advantage the [Bar] staff has is they're going to be around to argue for their case, and we're just dabblers."

STEPHANIE TURNER

You wouldn't keep 6,000 firefighters and all the equipment and planes and fighting the fire," he said before the report was released. "You would reduce it down to fight the remaining problem."

In recommending that the Bar eliminate the "luxury of redundant make-work practices," Alarcon's committee referred to "Parkinson's law" - the axiom that work expands to fill the time available. It

recommended a one-third cut in the State Bar Court and its staff, a major reorganization of the Office of Investigations and the Office of Trial Counsel, and the outright elimination of the complainants' grievance panel, the last stop for unsatisfied consumers. (emphasis added) Since **Alarcon's** (emphasis added) committe unloaded its bombshell, the Bar has been working to come to terms with the recommendations, pushing forward with the easier changes and drawing up plans for those that involve statutory authority, layoffs or other major surgery.

The State Bar Court, meanwhile, has fiercely resisted the notion that some of what it does may be redundant. It recently released a 40-page tome, plus attachements, detailing the misconceptions of the **Alarcon** (emphasis added) report.

Alarcon (emphasis added), for his part, isn't holding his breach that his committee's recommendations will be adopted wholesale. "We're all realists," he said.

The Recorder, December 13, 1994, Tuesday, Pg. 1 (9 OF 17 STORIES)

Bar Court Fires Back in Battle Over Budget

By STEVE ALBERT

The State Bar Court has leveled a blast at a special panel that evaluated the Bar's attorney discipline system and found it wanting. Saying that her court has cut costs and increased efficiency, **Presiding Judge Lise Pearlman has accused the panel, headed by federal Judge Arthur**

Alarcon (emphasis added), of failing to do its homework. "We think they made some errors," Pearlman said Monday. "They were overwhelmed with data and failed to understand a unique court."

The State Bar governor in charge of discipline, James Towery, says Pearlman may be right, but she and her court nevertheless had better get ready for more cuts and most probably some fundamental reforms.

Exactly what shape the Bar's massive $40 million attorney discipline system will take in the next few years is far from set. What is for certain now, though, is that when the first hard recommendations for change are released in March, they will have come after a fight.

Last week the Bar Court fired an opening shot, issuing a 37-page unsigned report critiquing **the recommendations of the committee headed by Alarcon (emphasis added), a senior judge on the Ninth Circuit U.S. Court of Appeals.** (emphasis added). The Bar Court's report stops short of calling the 11 committee members rank amateurs - but not far short.

In an interview Monday, Presiding Judge Pearlman reaffirmed those criticisms. She noted the committee - which spent about eight months reviewing the attorney discipline system at the bequest of top Bar governors - rendered its recommendations without once observing the court or circulating a draft for comment.

Told of the Pearlman remarks and having read the court's report, Towery said Pearlman ought to get on with

developing a strategy to meet the future with fewer resources. "We are interested in the next phase of how Judge Pearlman and others can be cost-effective," said Towery, a partner at Hoge, Fenton, Jones & Appel. "We want to know how they can maintain the same high-level work product with less personnel and more efficiency."

BAR COURT FEELS SINGLED OUT

The Alarcon Panel concluded in August that while the Bar's discipline system does fine work and could serve as a model to many states, it is overstaffed and wasteful at nearly every level. (emphasis added). The panel's 68-page report recommended broad changes to the discipline system, such as phasing out the Bar's grievance panel and eliminating the office of investigations. Last week, the Bar's new chief trial counsel, Judy Johnson, told a State Bar committee she is ready and willing to carry out many of the panel's recommendations.

As for the Bar Court, the panel recommended that the number of hearing judges be reduced from six to four and that an already authorized seventh position not be filled. The panel called on the court to stop publishing opinions in every case coming before it, and recommended that the number of lawyers assisting the court be cut from 15 to nine and that the court's 70-worker support staff be reduced in proportion.

Pearlman said the Bar Court has been unfairly singled ourt for too much of the panel's criticism. The court has actually reduced staff over the past few years while the

rest of the Bar's staff has grown, she contended. Pearlman said the court was a leader within the Bar in planning to use technology to reduce its work force.

"The State Bar Court has saved nearly $3.6 million out of its budgeted funds for the last five years, most of which has been used by the board of governors to balance the budget in other areas," the court stated in its report. "The 1995 budget of the State Bar Court is 13 percent lower than its 1994 budget. The current number of State Bar Court authorized employees is 7 percent lower than it was five years ago in 1989 despite the processing of 2.5 times as many cases per year."

The report concluded that the "proposed radical surgery on the court - recommending that two out of six hearing judgeships be cut - would cripple the State Bar Court."

The Recorder, December 12, 1994, Monday, Pg.5 (10 OF 17 STORIES)

Bar Promises More Efficient Discipline

By HANNAH NORDHAUS

The State Bar's new prosecutor on Friday outlined her plans in the wake of an August report criticizing the discipline system as overstaffed and inefficient.

Chief Trial Counsel Judy Johnson told a board of governors panel that the so-called Alarcon (emphasis added) committee report creates an opportunity for belt tightening in an era of "dwindling resources and a

taxpayer base that simply can not support ever-expanding dues." (emphasis added)

Johnson recommended that discipline officials start prioritizing complaints about lawyers according to their seriousness, rather than by how long they have been in the system.

"An old complaint about jaywalking in our system gets almost as much attention as a new complaint about homicide," Johnson said.

The former San Francisco assistant district attorney was named to the Bar post in late August, the same day that an 11-member panel headed by Ninth Circuit U.S. Court of Appeals Senior Judge Arthur Alarcon called for a major restructuring of the Bar's $40 million-a-year discipline system. (emphasis added)

Johnson, who started work in October, also said her office need to focus on egregious, intentional misconduct. She recommended that Bar prosecutors not pursue cases arising from honest mistakes, such as failing to communicate with clients, and instead refer such matters to attorney-client mediation programs and ethics classes.

Picking up on a recommendation in the Alarcon report, she also said the Bar should impose a five-year statute of limitations on grievances against lawyers." (emphasis added) The only thing that doesn't have a statute of limitations is a State Bar complaint and murder," she said. Old complaints are more difficult to investigate and

prosecute and often address problems that no longer exist, she said.

By concentrating resources on the most serious cases, Johnson hopes to force unscrupulous lawyers out of the profession more quickly. She also proposes taking a new look at the "standards for attorney misconduct," which serve as sentencing guidelines for State Bar Court judges.

In addition, Johnson has recommended establishing "targeted prosectutions" for misconduct such as billing or insurance fraud and fraudulent advertising before consumers complain.

Again echoing recommendations for staff cuts made by the **Alarcon committee**, Johnson advocated closer cooperation between Bar attorneys and investigators (emphasis added). Such a change would eliminate five managerial deputy director positions in the office of investigators.

The committee unanimously approved the principles of Johnson's proposed reforms.

It also voted to recommend that by the end of 1995 the Bar eliminate its complainants grievance panel, the last stop for consumers who feel their complaint was wrongly dismissed in its initial investigation. The committee plans to fold the grievance panel's functions into another Bar office.

GRAPHIC: Picture, JUDY JOHNSON: "An old complaint about jaywalking in our system gets almost as much attention as a new complaint about homicide," the Bar's new chief prosecutor said.

MAYA ALLERUZZO

The Recorder, August 30, 1994, Tuesday, Pg. 1 (11 OF 17 STORIES)

'Gold Plated' Bar to Face Cuts; Panel tags State Bar's $38M discipline system as wasteful, calls for reforms

by STEVE ALBERT

Former Drug Enforcement Administration chief Robert Bonner spent the Bush administration years chasing after the fat cats who ran South American drug cartels. Now Bonner has lowered his aim, but his zeal is undiminished.

After nine months of helping examine the State Bar's attorney discipline system, Bonner faced Bar governors and their top executives on Saturday and told them they had a "gold-plated" system run amok.

"There has been a failure to control the costs of the discipline system," Bonner said. The five-year-old $38 million-a-year system might be a model to some, he continued, but it is overstaffed and wasteful at nearly every level. He faulted Bar leaders for failing to rein it in.

Ninth Circuit U.S. Court of Appeals Senior Judge Arthur Alarcon (emphasis added), who headed the panel that submitted a 68-page report Saturday, was no less direct. "Bar management is nearsighted," said Alarcon in an interview. "They have accepted what they do as well done. They don't see the problems. But the emporer has no clothes."

Alarcon's 11-member Discipline Evaluation Committee - established last year at the request of Bar President Margaret Morrow - didn't recommend a specific amount it wanted to see cut. But it left little doubt that it believes the Bar can save money by starting to cut from the top.

The panel recommended a major resturcturing of the Bar's office of Trial Counsel, which acts as prosecutor in cases brought against errant lawyers.

The Alarcon (emphasis added) committee also called for reducing the number of judges and staff members on the State Bar Court; eliminating the Complainants' Grievance Panel, which hears consumers' complaints quarreling with the Bar's decision not to discipline a lawyer; and reducing the number of staff positions in the office that investigates the complaints.

While the committee praised the Bar for its efforts in the late 1980's overhauling the discipline system - which had been criticized as "secretive, slow and lenient" - it said the time had come for streamlining.

In addition, the committee said the Bar must better communicate with consumers and called for the addition of an independent, nonlawyer consumer advocate too deal directly with the public. An advocate could help consumers articulate their complaints

against lawyers and help them understand how the discipline process works. (emphasis added)

Bar governors reacted cautiously to the report, saying they would need at least six weeks to study it before drawing even preliminary conclusions. "We will not file it away," said incoming Bar president Donald Fischbach.

Bar governor and San Jose attorney James Towery, who will head the Bar's standing committee that ovversees discipline, said the Bar won't be able to implement any of the recommendations for at least six months. First, he said, Bar governors plan to seek comment from the public, lawyers, the Legislature and the Bar employees' union.

Discipline system executives said they, too, need to study the report. But, in interviews Saturday, some took exception to some of the recommendations.

"Gold-plated" was a reference to the State Bar Court," said Robert Heflin, the current chief trial counsel who is stepping down next month.

Francis Bassios, director of the Bar's Office of Intake/Legal Advice, called the committee's criticism of his $24,000-a-year travel budget "unfortunate" and said it lacked "perspective." The Alarcon committee called Bassios a "non-resident manager," noting that while his office is in San Francisco, 90 percent of the staff he supervises works in Los Angeles. (emphasis added)

Bar Court Presiding Judge Lisa Pearlman - whose court, the Alarcon (emphasis added) committee

said, spent half its time writing opinions that have no precedential value - said the state Supreme Court mandates that her court write the opinions. (emphasis added) Therefore, she said, any change in the court's operation sould have to come from the high court, which had to rule on nearly all discipline cases before the Bar Court was established in 1989.

Bar Court Executive Director Stuart Forsyth, who the report says maintains a ratio of supervisors to line staff twice that of state court staffing, said, "I really can't comment."

POOR COMMUNICATION

The **Alarcon committee** (emphasis added) all but predicted the reactions. "The individual units which make up the discipline system are not working together in pursuit of common, well understood goals," the committee's report states.

"There is poor communication between some of the units," it continues, "and open hostility between others. Each unit fights for new resources and retention of current resources without concern for the relative needs of other parts of the organization." **Alarcon added in an interview: "If this was Chrysler, they'd be looking for ways to reduce costs. But at an institution like this, there is less a feeling of need to be mindful of costs. Management needs to reevaluate and focus."** (emphasis added)

Committee member Pamela Edwards, a partner in the San Francisco office of the accounting firm

KPMG Peat Marwick, said the Bar needs a consumer advocate. The new post would mean new costs, Alarcon said. (emphasis added) But broad cuts in other areas would more than make up for the new position, he added. (emphasis added)

Edwards said the consumer advocate should be a nonlawyer mediator, not an adversary, who could assist consumers in articulating their complaints and who would be available to explain the discipline process to consumers. The advocate would work the Bar's chief trial counsel to develop consistent criteria to evaluate actions of attorneys warranting potential discipline.

The office of the consumer advocate would replace the Bar's Grievance Panel, which often takes as long as two years to review consumers' appeals to reopen discipline investigations that the Bar had closed.

Although the committee didn't put a price tag on its recommendations, it identified a number of areas to cut:

* Eliminate the Office of Investigations to realign the Office of Intake with a new consumer advocate unit.
* Reduce the number of Bar Court review judges, who handle appeals, from three to two, and cut support staff by a third.
* Reduce the number of Bar Court hearing judges from six to four and not fill a recently authorized seventh position. Stop writing opinions in every case coming before the court.

* Cut the number of lawyers assisting the court from 15 to nine and reduce support staff in proportion.

To hold senior management responsible for making touch decisions on cutbacks, Bar governors should reduce Bar dues from $478 per year in 1994 to $399 per year for 1996, the committee recommended.

"It appears that the board of governors has not clearly communicated that it has a strong desire to reduce costs or that senior management has not taken the board's priorities seriously." the report states.

The report also calls for a tougher stand toward attorneys in the discipline system. It recommends:

* Permanent disbarment for misconduct that is especially eregious and reprehensible.
* Requiring all attorneys to take a continuning legal education course in attorney discipline and client relations.
* Increase sanctions against attorneys facing several similar complaints. Mandate that all attorneys who are formally disciplined attend the State Bar's ethics school or get other appropriate training.
* Publish the name of firms where disciplined attorneys currently work.

Bar governor Towery said the Bar's response would include a fiscal and legal analysis of the Alarcon (emphasis added) recommendations. (emphasis added) Some recommendations, if adopted, would require statutory changes or changes in the rules of court written by Supreme

Court, he said. "We have to be sensitive to how the recommendations will affect people currently working in jobs," Towery said.

"Everybody on the board would agree it was a very appropriate time to reasses the discipline system," he said. "The Alarcon committee didn't pull any punches." (emphasis added)

Graphic: 1, Arthur Alarcon (emphasis added): "Bar management is nearsighted...They don't see the problems," said the judge who headed a review of the lawyer discipline system; Picture 2, JAMES TOWERY: The member of the Bar's board of governors said it will take at least six months to study and inplement reform recommendations. RECORDER FILE (1989)

The Recorder, 30, 1994, Tuesday, Pg. 1 (12 OF 17 STORIES)

New Bar Prosecutor Faces Fiscal Pressure

by MONICA BAY

On the same day that the State Bar received a harshly worded report criticizing its discipline system for being bloated and inefficient, the Bar named San Francisco prosecutor Judy Johnson as its new chief trial counsel.

If confirmed by the Senate, Johnson will be the first woman and first minority to head the discipline system, and organization that currently eats up about 75 percent of the Bar's $55 million annual budget, and employs 297 people. Johnson, who was selected by the governors in a 45-minute

closed meeting Saturday, will succeed Robert Heflin, who chose not to seek a second four-year term.

The Recorder, May 9, 1994

Exactly what the Alarcon committee, which already has held open meetings and invited comment from lawyers and the public, will recommend remians unclear.

Alarcon (emphasis added) says the committee's mission is to determine whether the system works fairly for consumers who believe they have been wronged, for the lawyers accused, and for all those who pay.

Specifically, Alarcon has asked Bar officials for a range of information: statistics on prosecutors' "win rates"; whether civility and client relations problems should be handled outside the discipline system; If lawyers who generate complaints because of poor client relations should pay discipline costs; for comparisons of the Bar court's caseload to the caseload of municipal and superior court judges around the state; recidivisim rates; and what budget reductions of 5,10 and 15 percent would mean to the current system.

Alarcon says it may be worth questioning the system's existence. "The doctors and dentists, the architects and engineers do not have their own prosecutor's office," he observes. It's possible the Bar should be out of the attorney discipline business altogether and discipline functions should be transferred to the state attorney general's office and the

Supreme Court, he says. "Why should there be a separate system for attorneys?" he asks.

Current Bar governor and discipline committee chairman Edward Huntington, a Riverside lawyer, says whatever Alarcon's (emphasis added) committee recommends, one this is sure: (emphasis added) No one should expect radical additions to the Bar discipline system.

To put the current system in place, Bar officials have raised dues 173 percent over the past six years. Today, the average California lawyer in practice for more than three years pays $478 a year, about $259 of which goes to the discipline system. "The governors won't recommend spending more without reductions somewhere else," Huntington says.

But many lawyers familiar with the system suggest enhancement and expansion - which would mean the spending of perhaps millions more, not less - is exactly what the discipline system needs to hit full stride and silence forever its critics.

"More has to be spent," says Arthur Margolis, a Los Angeles attorney and former Bar prosecutor who represents lawyers before the Bar. "They don't have enough investigators and attorneys."

Spending more, however, would be a tough sell politically. The outcry over the current dues level has not subsided, as letters to the State Bar Journal, the Bar's official news publication, will attest. "We're paying for a massive bureaucracy," says Diane Karpman, a Beverly Hills

lawyer who also represents lawyers before the Bar. "It's expensive. It's a Cadillac. Selective prosecution goes on. It's a drift net system where the sharks cut right through and the dolphins are made into tuna fish."

Now, in the first year of a Legislature-approved two-year dues cycle, Bar president Morrow says the projected defecit all but guarantees that cuts will have to made somewhere. While the discipline reforms were mandated by the Legislature, implementation has been at the Bar's discretion, Morrow notes. She insists that neither she nor other Bar governors have made any decision about cutting the budget. **But the timing of the Alarcon committee's review - when a budget defecit is projected and revenues are locked in - would seem to insulate Bar governors from crticism over trimming the discipline budget, and all but rules out enhancing or expanding it.** (emphasis added)

"You can always do better," says Dallas Holmes, a Riverside lawyer and former chariman of the State Bar board of governors' discipline committee. "No one will say, however, that this isn't our best effort. It's the jewel in the State Bar crown." GRAPHIC: Photograph, MARGARET MORROW: The State Bar president who named a committee to study the Bar's disciplinary system, says she and other executives have not decided whether to cut its budget. PHOTO BY MERYL SCHENKER; Photograph, DELORES BONNER: "They always seem to find unique ways to dismiss complaints," says the president of

CalJustice, a legal services watchdog group. PHOTO BY TED SOQUI; Photograph, Is it any wonder people are unhappy with lawyers and the way they handle discipline in their profession? - Richard Lubetsky, Century City attorney, PHOTO BY MARK J. TERRILL

The Recorder, March 14, 1994, Monday, Pg. 4 (15 OF 17 STORIES)

Bar prosecutor Will Step Down

by BILL KISLIUK, SAN FRANCISCO

State Bar chief trail counsel Robert Heflin has announced he will not seek reappointment to the post when his four-year term expires in September.

Heflin said Friday he will return to his former job as head deputy district attorney in Los Angeles.

As the Bar's chief litigator, Heflin oversees complaints, investigation and prosecutions in attorney discipline cases before the State Bar Court.

His announcement comes at a time when the State Bar's discipline system is under scrutiny. A Bar committee headed by Ninth Circuit U.S. Court of Appeals Judge Arthur Alarcon is evaluating the system's costs and effectiveness. (emphasis added)

Ned Huntington, chairman of the State Bar Board of Governors' Discipline Committee, said Heflin has agreed to stay on a few extra months if the Bar hasn't found a suitable replacement by the end of his term.

Heflin said Friday it always has been his intent to leave at the end of his current term. "When I came to the

Bar it was never intended that this would be a permanent position," he said. "It was always contemplated that I would serve one term here on loan from the DA's office."

The Recorder, January 28, 1994, Friday, Pg. 2 (16 OF 17 STORIES)

Discipline Expert Alters Stance on Confidentiality

by MONCIA BAY , LOS ANGELES

State Bar discipline complaints should be open to the public as soon as they're filed, a former chairman of the Bar's discipline committee said Thursday in reversing a long-held stance favoring confidentiality.

Don Mike Anthony, who headed the board of governors' discipline committe in 1986-87 and is a veteran of two American Bar Association discipline committees, said he changed his mind after seeing client's frustrrations first-hand. That was during his 1989-92 term on the ABA's Commission on Evaluation of Disciplinary Enforcement.

"After going over the whole country, I decided I was wrong," subcommittee of the Bar's Futures Commission during a meeting Thursday. The Futures Commission has a mandate to study all aspects of the Bar and report to the board of governors by year's end. Anthony's statement came on the same day that others - including Bar personnel - made several strong recommendations regarding discipline. Among them were proposals for electronic notification from banks to the Bar

when attorneys bounce trust account checks and for permanent disbarment of attorneys found guilty of wrongdoing, rather than letting them reapply in five years. Anthony, a partner at Pasadena's Hahn & Hahn, said one discipline system that impressed him was that of Oregon, in which all complaints are open to the public. The state's judges and Supreme Court, he said, maintain that the inconvenience or embarrassment to attorneys is outweighed by the benefits of candor. The California Bar currently keep complaint is made public. An open system, Anthony said Thursday, would enhance the State Bar's credibility with consumers and make sure it acted more responsibly. He cited situations such as the disciplinary proceedings against Los Angeles attorney Marvin Mitchelson several years ago, in which the Bar could not admit an investigation even a Mitchelson's problems were splashed all over the newspapers. "We looked like damned fools," he said. "We looked stupid. It's not going to hurt us [to open the files]. It will help us." Of 111,000 telephone complaints last year, Anthony said, only about 8,000 became active cases. Anthony, who serves on the ABA's Standing Committee on Professional Discipline, was one of several specialists who helped bring about significant changes in the discipline system in the '80's. While his opinions and others are aimed at helping the Futures Commission determine what changes to make, members of the subcommittee expressed some concern Thursday about protecting lawyers from frivolous complaints. **Ninth Circuit U.S. Court of Appeals Judge**

Arthur Alarcon (emphasis added), who is heading a second panel that's evaluating the existing system's costs and effectiveness, later expanded on the subcommittee's worries. "I want to think about [opening files so quickly]," he said. "I'm not sure how fair it would be to a lawyer who is absolutely ehtical and blameless and is subjected to harassment from a mentally ill or simply viscious client who has made a baseless claim." (emphasis added)

Anthony urged the Futures Commission to propose a "multi-door" screening system so dissatisfied clients will be directed to appropriate remedies for complaints - such as fee disputes - that are non-disciplinary and must be handled at the local level.

"Complaints are not bogus. Most complaints are legitimate consumer disputes," he said. "When the discipline system says Thank you for calling, but turns 95 percent of callers away, we are making people madder than hell."

Robert Heflin, chief trial counsel for the State Bar, echoed Anthony's concern. He said the Bar is considering replacing its current system - in which complaint analysts handle five toll-free telephone lines - with a computerized system that will provide callers with a menu of pre-recorded information tapes tailored to specific inquiries.

The Recorder, December 21, 1993, Tuesday, Pg. 6 (17 OF 17 STORIES)

Bar Names Discipline Review Panel

By MONCIA BAY

DATELINE: SAN FRANCISCO

The State Bar of California on Monday annnounced the members of a committee to evaluate how the Bar disciplines lawyers. The State Bar spends about $38 million a year of lawyers' mandatory dues to investigate and decide complaints against attorneys. Its discipline system was dramatically revamped in the late 1980's, with the addition of 12 full-time judges, in response to critics and the Legislature who decried the volunteer referee system was too slow and too lenient. The Legislature had appointed University of San Diego law professor Robert Fellmeth to oversee the reform process.

Bar president Margaret Morrow said in a press state that the new committee will "evaluate the costs, efficiency and effectiveness" of the revised discipline system. The group will begin working next month and is scheduled to report to the Bar's board of governors by September.

The 11-member committee will include:

* **The Ninth Circuit U.S. Court of Appeals Senior Judge Arthur Alarcon (emphasis added), who will serve as Chairman.** (emphasis added)
* Los Angeles Municipal Court Judge Aviva Bobb.
* Robert Bonner, partner at Los Angeles' Gibson, Dunn &

Crutcher and a former administrator of the Drug Enforcement Administration, Los Angeles U.S. attorney and federal district judges.

* San Francisco's Cedric Chao, partner at Morrison & Foerster and past president of the Asian American Bar Association. Johnnie Cochran Jr., Los Angeles trial lawyer and former L.A. assistant district attorney.
* William Davilla, president emeritus and director of The Vons Companies, a grocery store chain in Southern California.
* Pamela Edwards, partner at Oakland's KPMG Peat Marwick, who also served on a mayoral fiscal advisory committee for the city and county of San Francisco.
* Dennis Jones, executive officer of the Sacramento County superior and municipal courts
* Virginia Nelson, a San Diego solo practicioner who specializes in plaintiff's medical malpractice cases.
* Stuart Rappaport, Santa Clara County Public Defender
* Charles Schetter, director of McKinsey & Co., Inc., an international management consulting firm.

APPENDIX E

UNTIED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HOWARD G. JOHNSON	) CV 95-7356 KN
Plaintiff,	) (RNBx)
v.	) ORDER Re:
	) Defendants' Motion to
JUSTICES OF THE SUPREME	) Dismiss and Plaintiff's
COURT, et al.,	) Motion for Preliminary
Defendants	) Injunction
_____	)

Based on the papers, the Court hereby **GRANTS** Defendants' Motion to Dismiss and **DENIES** Plaintiff's Motions for Preliminary Injunction for the following reasons.

I. BACKGROUND

Plaintiff Howard G. Johnson is an attorney who has practiced law in California for over sixteen years. On July 29, 1994, Defendant Cydney Crickard of the Office of Trial Counsel of the State Bar instituted formal disciplinary proceedings against Johnson by filing a Notice to Show Cause with the State Bar Court. The Notice alleged four counts of misconduct, including the charges of failing to properly communicate with his client, aiding in the unathorized practice of law, failing to promptly return a portion of an unearned fee, forming a parternship with a non-lawyer, and failing to perform legal services competently.

Over the next two years, Johnson filed a series of motions in the State Bar Court, and petitions to the California Supreme Court, alleging the State Bar Court was unconsitutional. These included several Motions to Dismiss, a Motion, a Motion to Recuse Hearing Judge Carlos Velarde and all other State Bar Court Judges, and a request for referral to State Court. After hearings, all of Johnson's motions and petitions were denied. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss pp. 5-8. At this time, two of the counts against Johnson have been dismissed. On the remaining two counts, Johnson refused to testify, alleging a Fifth Defendant privilege. On November 1, 1995, Hearing Judge Velarde "tentatively" found that Johnson was culpable for the remaining two counts. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss p. 8. The State Supreme Court has not yet reviewed this matter.

A few days prior to the finding of Hearing Judge Velarde, Plaintiff filed this action for declaratory relief, injunctive relief, and damages, claiming the State Bar hearing process and selection of Hearing Judges have denied him due process and equal protection of the laws. He requests this Court to declare the State Bar court unconsitutional as a partisan and financially interested court.

Defendants State Bar of California, the State Bar Court, Hearing Judge Velarde, and Cydney Crickard ("the State Bar Defendants") have filed a Motion to Dismiss

based on the following grounds: (1) this Court should abstain from hearing this case based on Younger v. Harris, 401 U.S. 37 (1971); (2) lack of subject matter jurisdiction under Fed.R.Civ.P.12(b)(6); (3) the individuals being sued enjoy Eleventh Amendment an/or common-law immunity from monetary damages; and (4) failure to state a claim upon which relief can be granted under Fed.R.Civ.P.12(b)(6). Defendants Justices of the Supreme Court of the State of California join in the State Bar Defendants' Motion to Dismiss.

II. DISCUSSION

A. Judicial Notice

This Court takes judicial notice of the fact that six similar cases have been filed in the Southern, Eastern and Central Districts. Four of these cases have been dismissed at the District Court level and were consolidated for purposes of appeal. The Ninth Circuit affirmed the dismissal. Hirsh v. Justices of the Supreme Court, 67 F.3d 708 (9th Cir. 1995). The other two cases have also been dismissed.[1]

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[1] Defendant cites Hirsh v. Justice of the Supreme Court et al. F.3d 708 (9th Cir. 1995); Server v. Justices of the Supreme Court et al., (9th Circuit Case No. 98-55250, appeal)(consolidated with Hirsh from order, 1994, Central District Case No. CV-93-06789-SVW; Perry v. Justices of the Supreme Court et al; Ninth Circuit Case No. 94-55507, appeal (consolidated with Hirsh) for order dismissing case filed on February 22, 1994, Central District Case No. CV-93-06909-SVW; Espinoza B. v. Justices of the Supreme Court et al.; Ninth Circuit Case No. 94-56335, appeal (consolidated with Hirsh) from order dismissing case filed on August 30, 1994, Southern District Case No. CV-94-1299-H(POR), Acuna v. State Bar of California et al., Ninth Circuit Case No. 95-55499, appeal from order dismissing case led on February 28, 1995, Central District Case No. CV-94-8530-(AJWx); Grupton v. Justices of the Supreme Court et al., 1995 U.S. p. LEXIS 36286 (unpbl. op.) Ninth Circuit Case No. 95-15596, appeal from order dismissing case filed on March 3, 1995, Eastern District Case No. CV-94-01495-GEB/JFM; Acuna v. Justices of the Supreme Court, 1995 U.S. app. LEXIS 36294, Central District Case CV-95-7662 RAP (RBNx).

B. Younger Abstention

The Younger doctrine operates to prevent federal courts from interfering with state civil and criminal court proceedings and some state administrative proceedings, including State Bar proceedings. Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, 42 U.S. 592 (1975); Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982). In Hirsh v. Justices of the California Supreme Court, the Ninth Circuit upheld the lower courts' dismissal of a series of cases similar to this one based on the Younger doctrine, 67 F.3d 708 (9th Cir. 1995). The court applied Younger to abstain from deciding this case.

A federal court must abstain pursuant to the Younger doctrine if three connditions are met: (1) state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) proceedings provide the plaintiffs with an opportunity to litigate federal claims. Middlesex, 457 U.S. at 432. Younger abstention does not apply where the state proceedings is so biased as to deny the party adequate protection, Gibson v. Berryhill, 411 U.S. 564 (1973), or where state action is patently unconstitutional. Trainor v. Hernandez, 431 U.S. 434 (1997).

Pursuant to Hirsh, Johnson's case meets the requirements of Younger abstention. First, Johnson faced ongoing State Bar Court proceedings when he filed his complaint in District Court. These proceedings were judicial in nature.

Hirsh v. Justices, 67 F.3d at 712. See also Beltran v. State of California, 871 F.2d 777, 782 (9th Cir. 1982). Second, the Bar Court proceedings implicate important state interests. Middlesex, 457 U.S. at 434. Finally, Plaintiff has an adequate opportunity to present federal constitutional claims at the state level. As explained in Hirsh, while the State Bar Court is precluded from hearing federal constitutional claims, State Bar Court proceedings are appealable to the California Supreme Court. Hirsh, 67 F.3d at 712. Although these hearings are discretionary, there is no reason to assume the California Supreme court will not hear issues of federal constitutional importance, especially considering that it has heard other challenges to the constitutionality of the Bar Court. See Lebos v. State Bar, 53 Cal.3d 37, reh. denied, cert. denied, 502 U.S. 932 (1991) (California State Supreme Court rejected claims that State Bar Court hearing process was unconstitutional). As stated in Hirsh, "[r]efusing to abstain would require presuming that the California Supreme Court will not adequately safeguard Federal Constitutional rights, a presumption the U.S. Supreme Court squarely rejected in Middlesex... " 67 F.3d 713.

Plaintiff raises several arguments in opposition. He claims that his bias arguments are distinguishable from those raised in Hirsh. It appears that these variations in the two cases are merely distinctions without differences.[2] Even

[2] For example, Plaintiff claims that he is not raising the issue of financial interest which was addressed in Hirsh. Instead, he is raising

accepting Plaintiff's distinctions, however, the principles in Hirsh do apply to plaintiff's contentions.

Plaintiff's first argument is that the State Bar system is partisan because State Bar court judges are employees of the prosecuting party, the State Bar itself. The financial interest aspect of this argument was addressed in Hirsh. The Hirsh Court noted first that the salaries of Bar Court judges are set by statue. Cal. Bus. & Prof. Code section 6079 (d). Salaries are not in any way dependant upon sanctions imposed by judges. As for the "medical benefits, retirement plans, staffs, offices...." raised by Plaintiff, the Hirsh court also noted that the money collected in disciplinary proceedings totals less that one percent of the State Bar's total revenues 67F.3d at 714.

Second, Plaintiff argues the Client Security Fund administered by the State Bar overcomes the presumption for honesty and integrity of adjudicative decision makers on which the Hirsh Court relied in its decision. Id. See, e.g., Withrow v. Larkin, 421 U.S. 35, 47 (1974); Kugler v. Helfant, 421 U.S. 117 (1974). Because the State Bar may authorize the State Bar Court to administer the fund, see Cal. Bus. & Prof Code section 6140.5, Plaintiff claims that this entanglement with a state bar fund places this case

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the issue of partisanship. Plaintiff's first example under his partisanship argument is that the judges of the Bar Court are "selected, paid, employed, housed, trained and provided their supporting facilities and staff by the prosecuting party." opposition to motion to Dismiss, p. 4. This appears to be a restatement of a financial interest argument.

within the realm of the Nevada case cited in Hirsh. In that case, In the Matter of Ross, Bar Court judges were found to be impermissibly biased where they were responsibly for the financial interest of the State Bar and where disciplinary fines were a crucial source of revenue. 99 Nev. 1, 656 2d 832 (1983), cited in Hirsh 67 F.3d at 714, n3.

Plaintiff's argument is flawed for two reasons. First, Plaintiff does not allege that the State Bar has, in fact, delegated the administration of the fund to the Bar Court. Second, and more importantly, Plaintiff misrepresents the nature of the Client Security Fund. The legislature authorized the establishment of the Client Security Fund "to relieve or mitigate pecuniary losses caused by dishonest conduct of a member of the active State Bar arising from or connected with the practice of law". The Client Security Fund is not established for the purpose of administering other State Bar programs, as Plaintiff's Opposition implies. The fund is established to compensate financial victims of unethical attorneys with money collected from those attorneys. The State Bar does not achieve any overt benefit from this fund, and if an attorney is not "Found guilty" of a violation, no money is paid into or out of the Client Security

Fund.[3] The existence of the Client Security Fund does not reduce the presumption of honesty and integrity accorded State Bar Court judges.

Finally, Plaintiff alleges that, because the Supreme Court appoints attorneys to serve as judges in the Bar Court, the California Supreme Court is also biased. Plaintiff argues that because the California Supreme Court appoints employees of the State Bar, it is unfair bias for the Court to hear appeals from Bar Court decisions, argued by State Bar prosecutors. Opposition to Motion to Dismiss, p. 15. This argument appears to be little more than conjecture that offers no substantial proof in the face of the presumption of honesty and integrity afforded to adjudicators. See Hirsh, 67 F.3d at 714. Plaintiff has offered no credible evidence that the State Bar or the State Supreme Court are sufficiently biased to overcome the Younger doctrine.

In an additional attempt to overcome Younger, Plaintiff also asserts that the California Rules of Professional Conduct are patently unconstitutional. This issue was addressed in Hirsh and Plaintiff raises no arguments that were not raised in the Hirsh decision.

Because this action meets every prong of the Younger analysis, and because Plaintiff has failed to

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[3] Cal. Bus. & Prof. Code section 6140.5(b) provides that when an individual applies for reimbursement from the Client Security Fund, "the State Bar is subrogated.... to the rights of the applicant, against any person or persons who, or entity that, caused the pecuniary loss".

establish impermissible bias of patent unconstitutionality, this Court abstains from hearing this case for declaratory or injunctive relief.[4]

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[4] According to footnote 5 of the Hirsh opinion, it is unclear whether the Younger applies to proceedings involving monetary judgements or only to disputes concerning declaratory and injunctive relief. The Hirsh court declined to decide the issue. It is likewise not necessary to decide the issue in this case. As in Hirsh, the claims for monetary damages are barred by Eleventh amendment and common-law immunity.

B. Eleventh Amendment Immunity

Pursuant to the reasons outlined in Hirsh, the State Bar and the State Bar Court are immune from monetary judgement pursuant to the Eleventh Amendment. Lupert v. California State Bar provides that the California Bar Association is an agency of the state protected by the Eleventh Amendment from bringing claims against the individual bar court judges and prosecutors in their official capacities. Hirsh, 67 F.3d at 714.

C. Individual Immunity for Quasi-Judicial Legislative and Prosecutorial Functions

To the extent that Plaintiff may have claims against the individual defendants in their individual capacities, those claims are barred also. The individual Supreme Court Justices are immune both in their quasi-judicial roles (reviewing the recommendations of the bar court) and in their legislative capacity (rule promulgation). The Bar Court Judges and prosecutors enjoy common-law immunity for their prosecutorial judicial roles. Hirsh 67 F.3d at 715; See also, Butz v. Economou, 438 U.S. 478, 511-17 (1978). Plaintiff is therfore barred from seeking monetary damages against them.

III. CONCLUSION

Because this case meets the requirements of Younger and Middlesex and because the individual defendants are shielded from monetary damages by either sovereign or common law immunity, this Court **GRANTS**

Defendants' Motion to Dismiss this action, and therefore **DENIES** Plaintiff's Motion for Preliminary Injunction. IT IS SO ORDERED.

DATED:

DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

No. 96-631

(2)

Supreme Court, U.S.
FILED
NOV 20 1996
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

HOWARD G. JOHNSON, *Petitioner*

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

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JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Ninth Circuit's Order dismissing Petitioner's action against Respondents on Younger abstention grounds raises an important federal question which should be decided by this Court?

(2) Whether Petitioner's vague and unsupported allegations of financial bias in California attorney disciplinary proceedings should bar Younger abstention?

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STATEMENT OF THE CASE

Petitioner, Howard G. Johnson, is an attorney who, while undergoing disciplinary proceedings in the State Bar Court of the State Bar of California, filed a civil rights action in the Central District of the United States District Court alleging violations of due process and equal protection. Petitioner claimed, inter alia, that the California State Bar Court was unconstitutional as a "partisan" court and that its judges and the Justices of the California Supreme Court were financially interested in the outcome of disciplinary proceedings.

This action was similar to many other lawsuits filed in the Southern, Eastern and Central Districts, all of which were dismissed, and four of which were consolidated and dismissed in the case of Hirsh v. Justices of the Supreme Court, 67 F.3d 708 (9th Cir. 1995).

Petitioner seeks a writ of certiorari to review the Ninth Circuit's Order, filed May 6, 1996, which affirmed the dismissal of his action by the Central District Court on the grounds that Hirsh was dispositive of all bias issues raised by Petitioner.

Petitioner first argues that a writ of review should be granted because the Senior Judge of the Ninth Circuit, Arthur Alarcon, served on a task force (the "Discipline Evaluation Committee") which evaluated the disciplinary process of the State Bar of California. (Petition, pp.6-8.) Petitioner alleges in conclusory and speculative terms that Judge Alarcon's participation in the task force tainted all proceedings in the Ninth Circuit against him.[1] (Petition pp.6-8.)

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[1] Petitioner has introduced media clippings, which he has reprinted, regarding Judge Alarcon's participation on the State Bar of California's

Petitioner, however, fails to inform the Court that Judge Alarcon did not sit on the panel of judges which reviewed and ultimately affirmed the District Court's dismissal of Petitioner's action (Petition, Appendix A, p. 1(a)).

Petitioner next argues that, due to the "partisan" nature of the California Supreme Court and the presence of financial bias inherent to California's disciplinary system, sufficient bias to overcome Younger abstention has been established. (Younger v. Harris, 401 U.S. 37 (1971).) (Petition, pp.9-11.)

A. The Nature of the California Attorney Disciplinary System

The State Bar is a public corporation established in the judicial

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Discipline Evaluation Committee. (Petition, Appendix D, pp. 20(a)-58(a).) These materials were not made part of the record below. Respondents object to Petitioner's attempt to expand the record.

branch of government for the purpose of performing governmental functions in the administration of justice. (Cal. Const., art. VI, §9; Cal. Bus. & Prof. Code § 6001.) In matters of admissions and discipline of attorneys, the State Bar acts as an administrative arm of the California Supreme Court. (Rosenthal v. Justices of the Supreme Court, 910 F.2d 571, 566 (9th Cir. 1990); Saleeby v. State Bar, 39 Cal.3d 547, 557, 216 Cal. Rptr. 367 (1985).)

Although the State Bar, as the Court's administrative arm, has statutory authority to conduct disciplinary proceedings under California's State Bar Act, Cal. Bus. & Prof. Code §§ 6000, et. seq., the California Supreme Court retains inherent power to control all matters related to attorney discipline. (Jacobs v. State Bar, 20 Cal.3d 191, 196, 141 Cal. Rptr. 812 (1977).) "Final

authority for disbarment [and other forms of discipline] rests not with the bar but with the state Supreme Court." (Rosenthal, supra, 910 F.2d at 566-67.)

The State Bar Court, which independently determines matters of attorney discipline, includes a Hearing Department, which conducts formal trial proceedings, and a Review Department, which functions as an appellate body to independently review determinations of the Hearing Department on a de novo basis. (Rules of Proc. of State Bar, rules 2.17 and 2.27.) While the review of State Bar proceedings by the California Supreme Court is discretionary, Cal. Rules of Ct. rule 954(a), all actions of the State Bar Court regarding attorney discipline are subject to the independent and plenary review of the California Supreme Court.

(Cal. Bus. & Prof. Code §§ 6082, 6083, 6087.)

B. **Statement of Facts and Procedural History**

Formal disciplinary proceedings were commenced against Petitioner with the filing of a Notice to Show Cause in State Bar Court on July 29, 1994. Petitioner was charged with four counts of ethical misconduct stemming from his representation of four separate clients. Petitioner represented himself pro se. Ultimately, two counts were dismissed with prejudice.

In one of the remaining counts, Petitioner was alleged to have failed to communicate with his client and incompetently performed legal services by allowing the statute of limitations to expire before filing a lawsuit on behalf of a client. Petitioner also failed to promptly refund unearned fees advanced to

him by this client despite a judgment of the small claims court against him.

In a separate and related count, Petitioner was alleged to have failed to communicate with another client and failed to perform legal services competently by filing an answer in propia persona though he was hired to personally defend this client. Petitioner also failed to appear at the client's hearing which resulted in a judgment against the client. In addition, Petitioner failed to promptly refund the unearned legal fees to this client.

On August 23, 1994, Petitioner filed a motion to dismiss in State Bar Court alleging, inter alia, that the State Bar Court was unconstitutional. This motion was denied on September 13, 1994. Petitioner sought review of the dismissal in the California Supreme Court, which petition for review was denied by the

California Supreme Court by Order filed on December 14, 1994.

Petitioner then moved to recuse the Hearing Judge assigned to hear his case as well as all other State Bar Court judges alleging conflicts of interests. Petitioner's motion was denied by the State Bar Court on February 27, 1995.

Petitioner next filed in the Review Department of the State Bar Court a petition to refer his disciplinary matter to a state court alleging that the State Bar Court was unconstitutional. The Review Department of the State Bar Court denied his petition on July 6, 1995. This order was later vacated and replaced by a new order of denial on other grounds, filed October 13, 1995.

Petitioner filed a second petition for review in the California Supreme

Court on or about July 1995.[2] On or about August 1995, Petitioner filed a motion to recuse the Justices of the California Supreme Court.

The hearing in Petitioner's disciplinary action was held on October 30, 31, and November 1, 1995. Petitioner appeared pro se and when called to the stand, refused to testify alleging the Fifth Amendment privilege.

On November 1, 1995, the Hearing Judge tentatively found culpability on the two remaining counts of the formal charges and the matter was submitted for formal recommendation.

A few days prior to the commencement of Petitioner's disciplinary hearing (October 27, 1995), Petitioner filed in

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[2] At the time of the filing of Respondent State Bar's Motion to Dismiss in this matter, November 20, 1995, the California Supreme Court had yet to rule on Petitioner's second petition for review.

the Central District a civil rights complaint for damages and injunctive relief against the State Bar trial counsel assigned to prosecute the disciplinary action against him and the Hearing Judge who was presiding over the disciplinary proceedings as well as the State Bar Court and the State Bar of California ("Respondent State Bar"). Petitioner also named as party defendants the Justices of the California Supreme Court.

On November 20, 1995, Respondent State Bar filed a motion to dismiss which was joined by the California Attorney General on behalf of the Justices of the California Supreme Court. Petitioner filed an opposition. On January 31, 1996, The Honorable David Kenyon, United States District Judge for the Central District, granted the joint motion of Respondents the State Bar and the

California Attorney General on Younger abstention grounds.

Petitioner filed a notice of appeal on February 6, 1996. The Ninth Circuit, relying on the holding in Hirsh v. Justices of the Supreme Court, supra, 67 F.3d 708, affirmed the District Court's dismissal of Petitioner's complaint by Order filed on May 6, 1996. The Ninth Circuit noted that Hirsh "address[ed] and reject[ed] each of appellant's allegations relating to bias on the part of the California State Bar Court." (Id.)

Petitioner now seeks a writ of certiorari to review the Ninth Circuit's Order affirming the dismissal of his action by the Central District.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Affirmance of the Central District's Dismissal of Petitioner's Action Does Not Raise Important Federal Questions

Review of a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of the Supreme Court of the United States. None of the applicable reasons set forth in Rule 10 are available here. The Ninth Circuit's Order affirming the Central District's dismissal of Petitioner's lawsuit does not conflict with that of any other state court of last resort or of a federal appeals court (rule 10(b)); and the Ninth Circuit decision at issue does not decide an important federal question of federal law that should be decided by this Court, nor is it in conflict with any decision of the Court

(rule 10(c)). Moreover, Petitioner's claims are fact dependent and of no consequence for other litigants.

B. **Petitioner's Claims Regarding Conflicts of Interest And Financial Bias of Respondents And the Senior Circuit Judge For the Ninth Circuit In Attorney Disciplinary Matters Are Speculative And Groundless**

Petitioner contends that the California Supreme Court is biased in favor of the State Bar, and that it cannot carry out, in a disinterested manner, its adjudicative role in reviewing and making final determinations with respect to the discipline of attorneys in the State of California. (Petition, pp. 8-9.) In support of these contentions, Petitioner argues that the California Supreme Court's role in appointing State Bar Court judges and awarding costs to the State Bar are in

conflict with its adjudicative role. (Petition, pp. 8-10 & fn. 1.) Petitioner cites this Court's decision in Aetna Life Insurance Co. v. LaVoie, 475 U.S. 813 (1986), for the proposition that, his due process rights have been violated based upon his speculative allegations of bias. Petitioner's reliance on Aetna to support his argument is unavailing because of the complete absence of any demonstration of bias by the California Supreme Court in favor of the State Bar or the State Bar Court. (Aetna, supra, 475 U.S. at 822 [bias is demonstrated only by evidence of a "direct, personal, substantial, pecuniary interest" in the outcome of a particular proceeding].)

Petitioner also asserts that Ninth Circuit Senior Judge Arthur Alarcon's participation on a task force designated to review California's discipline system violated his due process rights.

Petitioner has failed to inform this Court of the fact that Judge Alarcon did not participate on the panel of judges who presided over Petitioner's action. (Petition Appendix A, p. 1(a).) Again Petitioner presented no direct or substantial evidence to support his baseless allegations against Senior Judge Alarcon. (Aetna, supra, 475 U.S. at 822.)

Petitioner's claims were addressed in the nearly identical case of Hirsh v. Justices of the Supreme Court of California, 67 F.3d 708 (9th Cir. 1995). The Hirsh plaintiffs, as does Petitioner herein, alleged that the State Bar disciplinary system was unconstitutionally tainted by bias thereby depriving them of due process and equal protection. The Ninth Circuit held, however, that Younger abstention was required and that no bias on the part of the Justices of the California Supreme

Court or State Bar Court judges existed.[3]

Similarly, Petitioner seeks to establish a bias exception to Younger abstention by claiming that California's disciplinary system is biased because of financial interests in the outcome of proceedings in the California Supreme Court. While abstention is "inappropriate in the 'extraordinary circumstance' that the state tribunal is incompetent by reason of bias" (Hirsh, supra, 67 F.3d at 713 (citing Gibson v. Berryhill, 411 U.S. 564 (1973)), when one alleges bias, a strong presumption of honesty and integrity must be overcome. Hirsh, supra, 67 F.3d at 713 (citing

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[3] Petitioner tries vainly to distinguish Hirsh from his own action. As stated by the Central District Court of California, "these variations . . . are merely distinctions without differences." (Petition Appendix E, p. 64(a).)

Kenneally v. Lungren, 967 F.2d 329, 333 (9th Cir. 1992)). The Ninth Circuit Court in Hirsh held that the appellants, alleging the nearly identical unsupported and conclusory bias contentions now claimed by Petitioner, had failed to overcome this presumption of impartial and unbiased adjudicators. For the same reasons set forth in Hirsh, Younger abstention directly applies to the similar allegations of bias asserted by Petitioner.

CONCLUSION

Petitioner has failed to present any facts to support his request for a writ of certiorari, nor has he demonstrated that any of the actions taken by Respondents in connection with his case were improper. For these and all of the foregoing reasons, Respondents the State Bar and the Justices of the Supreme Court of California respectfully request this

Court to deny the petition for writ of certiorari.

DATED: November 19, 1996

Respectfully submitted,

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(3)

No. 96-631

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HOWARD G. JOHNSON,

Petitioner,

vs.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, et. al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE ISSUES

Is not the possibility of contamination of proceedings within a Circuit Court by the active and public participation of a senior judge as spokesman for a party on its constitutional issues an important federal question for this Court?

Is not judicial bias based on partisanship for a party an important exception to *Younger* abstention?

I. The Significance of Public Support for a Party By a Senior Circuit Court Judge and Contamination of a Panel Merits Review

There are few sources available concerning the disqualification of appellate federal judges. Stempel, Rehnquist, Recusal and Reform. 53 Brook. L. Rev. 589, 638 (1987). 28 U.S.C. section 455 (a) states that "any justice... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Whenever a reasonable observer could reasonably infer that the challenged judge has lost his impartiality, an appellate justice in the federal court system should recuse himself.

Three California Circuit Court judges summarily dismissed the appeal after the filing of the opening brief which raised the issue of their disqualification due to the public advocacy and participation by their California colleague, Senior Judge Arthur Alarcon, for the State Bar party and its claimed

court, the constitutionality of which was the issue presented in the appeal.

Then they barred the filing of any further papers. "No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submission shall be filed or entertained in this closed docket." Appendix 1a.

There does not appear to be a procedure within the Circuit Courts which is followed to require a federal judge to check if a party who has requested his participation in its cause has pending litigation in the multi member tribunal in which he sits. Had Judge Arthur Alarcon checked the docket, he would have discovered four cased concerning the State Bar of California and its claimed Court pending in the Court in which he sat before he accepted his appointment with it. Before he made over fifty public statements in support of that party and its Court, wisdom should have dictated he check the docket to ascertain whether his public statements for the press would likely influence his colleagues in their determination of the constitutional issues concerning that party. These remedial steps were not taken.

Was there tribunal contamination? The rapidity with which the **Hirsh v. Justices of the Supreme Court of the State of California** 67 F.3d 708 (9th Cir. 1995) decision issued, without addressing the constitutional issues, the summary dismissal of this Petitioner's appeal upon filing of the opening brief raising the recusal and contamination issue; the panel consisting of solely California judges who are Judge Alarcon's California colleagues who had daily access to the press statements he made for a party and its claimed Court; and the bar to filing

any papers is indicative of the hostility, actual bias and inflamed rage that was created by the persistent press statements by Judge Alarcon in support of a party and its Court and the confrontation with his public support for a party which was presented by the appeal alleging this party's Court is unconstitutional.

Were the three California judges required to recuse themselves? An objective observer would conclude that the news articles and press statements made by Senior Judge Arthur Alarcon suggesting improvements to the party's Court and describing it as a fair system blinded his three California colleagues and their duty to decide fairly. Their blinded eyes saw red when the issue was raised. They slammed the door to the courthouse so that no one would see.

This Court is the only available Court to prevent appearances of impropriety and of conflicts between personal caused and the duty of federal appellate justices to recuse themselves when their impartiality is reasonably questioned. This is an important federal question for this Court to decide.

II. The *Younger* Bias Exception Applies When a State Supreme Court Appoints Employees to a Party and Judges are Employees of a Party

A well-recognized exception to the application of *Younger* abstention is bias in a state adjucator. **Gibson v. Berryhill** 411 U.S. 564 (1973).

Judges are disqualified for interest in the outcome. **Aetna Life Insurance Co. v. La Voie** 475 U.S. 813, 822, 106 S.Ct. 1580, 1585, 89 L.Ed. 2d 823 (1986). This Court's decision in **Aetna** did not limit the application of the necessity of disqualification of a judge to a direct financial interest. This Court stated in **Aetna, supra,** "what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision," (quoting **In re Murchison** 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Everyone agrees that interest in the outcome disqualifies a judge. The problem is what kind of activity makes a cause one's own. K. Davis, Administrative Law 340 as set forth in R. Flamm, Judicial Disqualification; Recusal and Disqualification of Judges, p. 202, ft. 2, "Not only is a biased decision-maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." **Withrow v. Larkin** 421 U.S. 35, 47 (1975).

This Petition addresses the "other interest" disqualification standard.[1] This petition is important in addressing what degree of partnership for a party requires a judge's recusal.

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[1] "In those jurisdictions in which disqualification for "other interests" has been authorized, however, the term "other interests" has usually been poorly defined, (footnote omitted), a fact that had led to confusion on the part of both federal judges (footnote omitted), and those of many state courts. Because of this confusion, determining precisely what types of "other interests" may suffice to merit judicial disqualification is not a simple task. (footnote omitted)." R. Flamm, Ibid. at 216.

There are circumstances beyond pecuniary interest where a judge has a temptation not to hold the balance nice, clear and true. Respect for the judicial function requires forbearance from an appearance of impropriety. Extrajudicial interest in the outcome of a case by a judge taints a judicial proceeding with suspicion within the Public's mind.

When the circumstances indicate there is a basis for this suspicion, the higher duty of the Courts may be to remove a judge who suffers from no actual bias, but whose factual relationship to the issues and parties suggests a temptation toward unconscious leaning for a party involved.

What are the interests implicated in the creation by the California Supreme Court of a private court owned and run by a private prosecuting party and staffed by its appointees employed by that party? Its first interest is to cut down on its workload. Relieving itself from admitting and disciplining attorneys and placing those functions in the hands of private persons does relieve the California Supreme Court's workload. While court congestion is a legitimate concern of the courts, removing the highest state court's duty to admit and discipline its court officers may be false efficiency. The morale of California court officers is low. They have no Court to guide them. Lack of morale leads to discipline problems. It leads to alienation of attorneys from their self-respect and dignity as court officers. Attorneys licensed by employees of a State Bar are not court officers. They are bar functionaries. They have no allegiance to the Courts or the law. They are loyal to the private interests of the State Bar entity, and not the public interests of the Courts and the calling of the law.

The second interest of the California Supreme Court served by its appointing employees to a party to be judges licensing attorneys is expense. The taxpayers do not have to pay for the licensing of attorneys. They do not have to pay for its State Supreme Court to consume time and resources researching, writing and publishing opinions concerning attorney ethics and admission and discipline of attorneys, because it does not do so. Its appointees, as employees of the prosecuting party, write and, from their own private funds, pay for their opinions for the California Supreme Court. As employees of the prosecuting party, they always decide for their employer and against each accused attorney. The California Supreme Court's summary denial of review for over six years then contains an order for the adjudged guilty attorney to pay costs to the State Bar. These are the administrative costs necessary to pay the salaries and benefits of the appointees of the California Supreme Court and their co-employee prosecutors and investigators.

The third interest of the California Supreme Court is to ensure that its appointees to the privately financed prosecuting party are paid and provided their staffs, facilities and expenses. The minimum one million dollar expense for its appointees' privately financed salaries is paid by the California Supreme Court denying review to each accused and ordering the now adjudged guilty attorney to pay the costs for the salaries and benefits of its appointees. As set forth in the California State Auditor's report of May, 1996, $16,241,790 has been assessed by the California Supreme Court as costs payable to the employer of its appointees for the four years of 1992-1995 from guilty

adjudications against accused attorneys. $4,428,664 of that sum is the administrative costs assessed for its appointees' salaries, benefits, expenses, staffs and facilities.[2]

The fourth interest of the California Supreme Court is to prevent a depletion of funds of the employer of its appointees so that its appointees are provided staffs, facilities, expenses, training and their salaries. This is guaranteed by it making sure no accused attorney is ever found innocent, since, by statute, this would enable such an accused attorney to collect his reasonable expenses of defending the proceedings from the employer of its appointees. The second method of making sure ample funds are available to provide for its appointees to the prosecuting party is to make sure attorneys know they have no chance of ever being found innocent and of obtaining impartial review of guilty adjudications by its appointees. This it has done by denying over all petitions of accuseds summarily per curiam since 1989 when it first appointed its nine appointees and by assessing costs based on how long the accused fights for its innocence by escalating the costs awards based on what stage of the proceeding obtains the guilty adjudication. Assessments before notice are generally less than $2,000. Once a notice issues, it is a minimum of $4,466. For each day of trial, it is an additional $500-$1000 a day. These cost awards are then added to the attorney's dues' bill, and if not paid, result in summary ex parte suspension of the attorney.

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2 California State Auditor, State Bar of California: Opportunities Exist to reduce Fees, Better Control Administration and Planning, and Strengthen and Improved Discipline Process, at page 10.

The fifth interest of the California Supreme Court is speed of disposition. With partisan appointees hire, paid, trained, provided their staffs, facilities, and expenses by a private party, and provided these benefits based on how fast and how much monies from accuseds they obtain for their employer, proceedings are quickly disposed of. All motions, petitions, discovery requests, continuances, requests of accuseds are summarily denied with no law or facts stated. This has yielded 5,000 guilty adjudications in six years in a mill operation of preordained result.

The issue is not financial interest in the adjudicators. While the State Supreme Court and its appointees do not pocket the sixteen million dollars obtained in four years, they adjudge guilt to obtain these monies so as to finance the private court system in which they have a vested interest. This is similar to **United Church of the Medical Center v. Medical Center Comm.** 689 F.2d 693 (7th Cir. 1982). The monies are obtained for a fund which is earmarked for their employer's use.

While there is a presumption of impartiality within adjudicators, the fact that the financial beneficiary of guilty adjudications is the employer of the State Supreme Court's appointees, and the administrative adjudicators are employees of the prosecuting party and provided their benefits, housing, training, pay, expenses, and staffs by that party, should overcome the presumption. Each adjudicator is partisan for a party. It is the prosecuting party's interest they serve, not impartial justice. While not a financial interest of a direct nature, it is an institutional, inherent and structural bias for a party.

Hirsh, supra did not address the relationship to financial beneficiary and the partisanship issue. It stated, "Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code at 6086.5... The Hearing Department...conducts a... hearing during which the accused attorney and a State Bar prosecutor present evidence before a Bar Court judge." Appendix 4a. The statute provides that the court is run, owned and created by the prosecuting party, not affiliated with it. "The Board of Governors [of the State Bar of California] shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary...proceedings." Appendix 17a, section 6086.5. Its judges are, by statute, selected, housed, paid and trained by the prosecuting party and "the Board [of Governors of the State Bar of California] shall fix and pay [them] reasonable compensation and expenses and provide adequate supporting staff and facilities." Appendix 17a **Hirsh, supra,** did not address that which it mentioned-the claimed Court and its judges are owned by a party.

Hirsh, supra, states, "Appellants offer only conjecture in support of their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. As the district court noted, district court judges are not deemed incompetent to review the findings of magistrate judges whom they participate in appointing. Compare **Vanelli v. Reynolds Sch. Dist. No. 7,** 667 F.2d 773, 779-80 & n. 10 (9th Cir. 1982) (school board reviewing its own prior decision was not

impermissibly biased)". Appendix 17a. It is the appointment of judges employed, housed, trained, provided their salaries and benefits and complete staffs by a privately financed prosecuting party that is the bias issue. It was not addressed.

CONCLUSION

The Ninth Circuit denied due process. The bias exception to *Younger* abstention deserves review. It is a substantial federal question to have 155,000 attorneys lacking an impartial State Supreme Court to listen to them.

It is a substantial federal question to have employees of a prosecuting party adjudicating guilt and obtaining for their private employer sixteen million dollars to pay for their expenses.

For the foregoing reasons this Honorable Court should grant the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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